(1) Supreme Court, U.S.
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In The

Supreme Court of the United States

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FRANKLIN SANDERS,

Petitioner,

v.

WILLIAM E. FREEMAN, JR. and CHARLES BURSON,

Respondents.

◆

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

◆

PETITION FOR WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED FOR REVIEW

I. Was Petitioner Franklin Sanders wrongfully denied a writ of habeas corpus, because the courts below refused to apply clearly established federal monetary law and this Court's rulings to his claim that Tennessee's taxation of exchanges of gold and silver coins and bullion for Federal Reserve Notes unconstitutionally interferes with Congress's monetary powers?

II. Was Sanders wrongfully denied a writ of habeas corpus, because the courts below refused to apply this Court's rulings on due process to his claim that his indictment and conviction were unconstitutional inasmuch as:

Tennessee law provided no prior notice that his failure to collect sales taxes on exchanges of gold and silver for Federal Reserve Notes was criminal; and

Tennessee used his prosecution both to define and to punish an alleged tax crime that the Prosecution itself admitted required proof of a matter not set out in the applicable statutes?

III. Was Sanders wrongfully denied a writ of habeas corpus, because the courts below refused to apply this Court's rulings on due process to his claim that his conviction was unconstitutional, where:

at trial, Sanders was convicted even though the Prosecution admitted that sales tax applied only to exchanges of gold and silver coins for Federal Reserve Notes where the customer had an "investment" intent, but then failed to prove sufficient transactions of that nature to meet the jurisdictional amount the indictment required; and

QUESTIONS PRESENTED FOR REVIEW – Continued

on appeal and habeas, the courts upheld Sanders' conviction on two new theories of liability that made every exchange taxable, even though the Prosecution had never suggested, and Sanders had never had an opportunity to be heard on, such theories at trial?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Sixth Circuit, the judgment of which is sought to be reviewed, include Petitioner Franklin Sanders, an individual, and Respondents William E. Freeman, Jr., Director of the Shelby County, Tennessee, Correctional Center, and Charles W. Burson, Attorney General of the State of Tennessee.

CORPORATE DISCLOSURE STATEMENT

This proceeding is not filed by or on behalf of any nongovernmental corporation, or any parent or publicly held corporation holding 10% or more of any such corporation's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Franklin Sanders prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered on 19 July 2000.

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OPINIONS BELOW

The opinion of the Court of Appeals sought to be reviewed is reported at 221 F.3d 846. Appendix ("App.") at 1a. The judgment and order of the United States District Court for the Western District of Tennessee, granting Respondents summary judgment, are unreported. *Id.* at 34a. The District Court's order granting Respondent Freeman's motion to add proper parties is unreported. *Id.* at 59a. The decision of the Supreme Court of Tennessee in Sanders' underlying criminal case is reported as *State v. Sanders*, 923 S.W.2d 540 (1996). App. at 63a. The decision of the Tennessee Court of Criminal Appeals is reported at 1994 WL 413465. App. at 73a.

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STATEMENT OF JURISDICTION

On 19 July 2000, the Court of Appeals entered the judgment to be reviewed here. *Id.* at 33a. This petition is timely filed under this Court's Rule 13.1. This Court has jursidiction under 28 U.S.C. § 1254. No formal notification under this Court's Rule 29.4(c) has been made, because the Attorney General of Tennessee is a party to this proceeding.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves:

- Article I, § 8, cl. 5; Article I, § 10, cl. 1; Article VI, cl. 2; and Amendment XIV, § 1 of the Constitution of the United States.

- 12 United States Code § 411; 31 United States Code §§ 5101, 5103, 5112(a, b, c, e, f, h, i) and 5118(a, d).

- Tennessee Code §§ 47-1-201(24), 47-1-201(26-28), 47-2-202, 67-1-1440(d), 67-6-102(1), 67-6-102(6)(C), 67-6-102(22), 67-6-102(23)(A), 67-6-102(24), 67-6-102(26), 67-6-201(1), 67-6-202(a), 67-6-501(a-c), and 67-6-504(a-b).[1]

The pertinent text appears in App. at 100a.

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STATEMENT OF THE CASE

A. The Basis for Federal Jurisdiction.[2] Sanders was indicted under Tenn. Code § 67-1-1440(d) for "depriv[ing] the State * * * of * * * sales tax revenue, of an amount exceeding five thousand dollars ($5,000.00) by design in that he * * * failed to file * * * tax returns".[3] App. at 113a-14a. Found guilty by a *jury in the Criminal Court of* Shelby County, he was sentenced to imprisonment, restitution, and community service. The Tennessee Court of Criminal Appeals affirmed. 1994 WL 413465, App. at 73a. The Tennessee Supreme Court also affirmed. 923 S.W.2d 540 (1996), App. at 63a. All State remedies exhausted, Sanders petitioned the District Court under 28 U.S.C. § 2254. *See* App. at 111a. That court granted Respondents summary judgment. *Id.* at 34a. On Sanders' appeal under 28 U.S.C. § 2253, the Court of Appeals affirmed. 221 F.3d 846, App. at 1a. This petition followed.

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[1] The numbering of these provisions is as it appeared at the time of Sanders' conviction. The Appendix identifies changes in numbering that have occurred since then.

[2] The facts recited hereinafter appear, with citations to the record in the Tennessee trial court, in Sanders' Amendment to Petition for Writ of Habeas Corpus, *in* App. at 111a, which he hereby incorporates by reference.

B. The Facts Material to the Questions Presented.[4] Sanders was a moneychanger. *Id.* at 115a-17a. His "Trade Confirmations" described his business as exchanging "money substitutes" (Federal Reserve Notes, or "FRNs") for silver or gold coins or bullion (collectively, "specie") valued in "dollars", and defined "dollars" of gold and of silver as certain weights of metal, pursuant to United States statutes. *See id.* at 161a-66a. Because the Confirmations specified payments in particular coins or currencies, Sanders considered them "gold-clause contracts". And he filed no sales-tax returns because he believed that exchanges of FRNs for specie were nontaxable exchanges of money. *Id.* at 117a-19a, 124a-27a, 130a-32a.

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[3] An additional count was later dismissed on appeal. App. at 95a-96a.

[4] As Sanders' petition arises out of a summary judgment, this Court must presume that there are no disputes of material facts, and view the evidence in the light most favorable to him. *United States v. Diebold*, 369 U.S. 654, 655 (1962).

Prior to his indictment, he was aware of no prosecution of moneychangers under Tenn. Code § 67-1-1440(d), or of any applicable administrative or civil decisions. Although Tennessee's undercover agent Wade Smith knew that Sanders believed moneychanging nontaxable, the authorities never notified or warned him that his position was not only wrong as a matter of tax law but also a criminal violation. And although § 67-1-1440(d) reaches only acts that "deprive the state of the realization of such revenue at the time it is lawfully entitled thereto", prior to the indictment Tennessee never established that it was "lawfully entitled" to any "revenue" from him. App. at 120-22a, 128a, 133a-34a.

C. **The Proceedings Below. 1.** At trial, Sanders raised federal constitutional defenses: *First,* that exchanges of FRNs for specie were nontaxable, because they were exchanges of "notes" or "obligations", or of "money substitutes", for money. *Id.* at 117a-20a, 124a-27a. He contended that all domestic silver and gold coins, and FRNs, are equally legal tender. 31 U.S.C. §§ 5103, 5112(h). Bullion is also money. *See Bronson v. Rodes,* 74 U.S. (7 Wall.) 229, 249-50 (1869). Gold Krugerrands are legal tender in South Africa. *See* App. at 118a & n.11, 143a. And, under Tennessee law, " '[m]oney' means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency". Tenn. Code § 47-1-201(24). Moreover, the Prosecution admitted that exchanges of money for money are nontaxable. App. at 132a. Therefore, Sanders asserted, by subjecting moneychanging to sales tax, the Prosecution was treating only FRNs as "money", and specie as nonmonetary "tangible personal property".[5] This violated the monetary provisions of the United States Constitution (Article I, § 8, cl. 5 and § 10, cl. 1), monetary statutes of Congress, the Supremacy Clause (Article VI, cl. 2), this Court's decisions, and Tennessee's own law. App. at 117a-20a, 144a.

Second, Sanders advanced his good-faith belief and lack of contrary notice that moneychanging was nontaxable. The Prosecution claimed that it had "no duty to proceed civilly in the presence of a criminal violation" of § 67-1-1440(d), that "notice is not required under [that] statute", and that Sanders had "plenty of notice in the indictment". It also admitted that Tennessee had given Sanders no *pre*-indictment notice, and adduced no precedent applying Tennessee's sales tax to moneychangers prior to his indictment. Sanders denied that he had seen an opinion of Tennessee's Attorney General that sales tax applies to exchanges of specie for FRNs, until after the operative time period in the indictment. The Criminal Court instructed the jury, and the Prosecution conceded, that the opinion "is not law" and "is not binding as case authority or as a statute" on Sanders. App. at 120a-34a, 143a-44a.

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[5] The Prosecution valued Sanders' exchanges in FRNs. And Tennessee law defines "sales price" as "the total amount for which * * * tangible personal property is sold * * * , valued *in money*". Tenn. Code § 67-6-102(24) (emphasis added).

On these facts, Sanders contended that, even were moneychanging taxable, the unprecedented application of Tenn. Code § 67-1-1440(d) and related statutes denied him due process under *United States v. Mallas*, 762 F.2d 361 (4th Cir. 1985), and cognate cases, because: He had a nonfrivolous legal theory that moneychanging is not taxable. With no *pre*-indictment prosecutions of moneychangers under § 67-1-1440(d), nor any civil cases or administrative decisions in Tennessee, he lacked notice that the law applied to him. And the Prosecution conceded that, although the sales tax referred to "tangible personal property" in general, it applied only to exchanges of specie for FRNs that involved an "investment" intent – a gloss that appeared nowhere in the statute or in any *pre*-indictment Tennessee judicial or administrative ruling. Sanders therefore contended that his indictment (let alone conviction) denied due process under § 1 of the Fourteenth Amendment, because "where [a criminal] law is vague the defendant lacks * * * intent to violate it"; and "the state is required to proceed civilly in pioneering interpretations" of the statute.[6] App. at 120a-34a, 143a-44a.

Third, Sanders objected to the Prosecution's failure of proof: That, even if *arguendo* exchanges of bullion were taxable, they did not generate the "tax revenue * * * exceeding five thousand dollars" the indictment required.

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[6] This lack of notice became more acute when the Tennessee appellate courts and then the federal courts adopted two *new* theories of liability that dispensed with proof of "investment" intent altogether. *See post*, at 9-11, 13-16.

And that, even if Charles Batey testified to an "investment" intent, no other customer did – rendering their exchanges of coins nontaxable under the Prosecution's theory, and excluding sufficient "revenue" for conviction, even when added to the exchanges of bullion. *Id.* at 119a-20a, 132a-33a, 139a-41a, 144a-45a, *and* TABLE, at 137a.

2. The Prosecution's chief witness on its theory of liability claimed that "if you hold [specie] for an investment or for collection purposes, it is tangible personal property". The Prosecution never argued that exchanges of specie were taxable simply because coins exchanged for the "intrinsic values" of their component precious metals, measured in FRNs, rather than their face values. App. at 132a-33a.

The Criminal Court limited the Prosecution's case to five customers. Charles Batey answered "Yes" when asked if he was "investing in gold coins, silver coins, bullion" generally – but never stated that he had an "investment" intent with respect to any transaction with Sanders. Don Webb testified that he acquired coins as "promotional gifts". Jon Thompson was not asked why he had acquired bullion. (Apparently, he gave some to his children.) Bernard Verhaeghe did not testify. Sanders testified that Verhaeghe's exchanges were to "bring[ ] money back" into the United States from Switzerland for some third party. And undercover agent Wade Smith's intent was only to discover if Sanders was collecting sales tax. *Id.* at 135a, 139a-41a. *See id.* at 24a, 77a, 137a. (The Prosecution proferred no evidence that any customer acquired specie for "collection purposes".)

The Criminal Court provided the jury with, and the Prosecution requested, no instruction that exchanges of coins were taxable simply because the FRNs' face values were greater than the coins' (*i.e.*, the coins exchanged at their "intrinsic", rather than nominal, values). *Id.* at 142a.

3. After Sanders' conviction, the Criminal Court received evidence that Krugerrands are legal tender in South Africa, but denied his motions raising federal constitutional issues. *Id.* at 143a-48a. Only after the conviction did Tennessee invoke civil process to collect taxes. *Sanders v. Huddleston,* No. 103004-3 (Shelby Cty. Tenn. Chancery) (now pending).

4. The Tennessee Court of Criminal Appeals affirmed. **a.** Citing decisions of courts outside Tennessee that "taxability turns on 'whether the coins were purchased for * * * the value of the precious metal; or for their intangible value as a medium of exchange' ", the court ruled that, "because the coins and bullion involved were sold according to their intrinsic value, they properly fall within the meaning of 'tangible personal property,' and their sale is [taxable]". App. at 86a-87a. The court, however, referred to no point in the trial record at which the Prosecution had augmented its "investment" theory and argued, or the trial court had ruled or instructed the jury, that Sanders' exchanges were taxable simply because specie was "sold according to [its] intrinsic value".

Although the court had reduced specie from "money" to taxable "tangible personal property", it denied that this

> impinge[s] upon the exclusive right of the federal government to regulate the value of money, coin money, or determine the character of legal

> tender. . . . The tax * * * was based on the value of the precious metal; not the intangible value assigned the coins by the federal government. Common sense dictates this regulation has nothing to do with the coining of money or the regulation of its value.

Id. at 87a-88a.

b. The court recognized that Sanders' "due process/fair notice claim is * * * complex", and acknowledged his contention that *Mallas* and cognate cases applied because his "tax liability is 'vague and highly debatable,' and * * * traditional sources of notice (civil, administrative, and criminal precedent) are silent and therefore ambiguous". Even so, it held the *Mallas* cases "distinguishable". App. at 78a-82a. And notwithstanding that, under those cases, Sanders' intent was irrelevant, the court opined that the jury could have found that he lacked a good-faith belief that his exchanges were nontaxable. *Id.* at 82a-85a.

c. The court then rejected Sanders' argument that

> the only transactions * * * possibly * * * subject to taxation are the sales of bullion and two (2) sales of coins which, according to the testimony, were for "investment" purposes. Although [Sanders'] assertion that these sales do not render a sales tax in excess of five thousand dollars ($5000) is correct, * * * we found * * * all of the transactions * * * subject to sales tax, not just the ones * * * for "investment" purposes.

Id. at 88a. Thus, despite the Prosecution's concession at trial, the court ruled that "investment purpose" is unnecessary to render taxable an exchange of specie for FRNs, but that the coins' value in FRNs exceeds their nominal face value suffices – although that theory was not suggested at trial.

5. The Tennessee Supreme Court affirmed. **a.** On the constitutional issues of money and due process, it adopted the Court of Criminal Appeals' reasoning – untroubled that it could find no relevant Tennessee decision, but had to reach out to "[o]ther jurisdictions with * * * statutes similar to those in Tennessee [that] have held * * * gold and silver" taxable. *Id.* at 68a-71a.

b. The court also stated that "[t]he evidence * * * establishes the State's position that [Sanders'] transactions * * * were based on the intrinsic value of the precious metals rather than their representative value as a medium of exchange". *Id.* at 69a. It forgot that the Prosecution never asserted this "position" at trial, or directed the trial court or jury to such "evidence", but instead relied only on the "investment" theory, and that the Court of Criminal Appeals injected the "intrinsic-value" theory into the case for the first time in its decision.

6. Following the Tennessee appellate courts, the District Court granted Respondents summary judgment, admitting that

> [t]he intermediate appellate court chose to eliminate the element of customer intent, as prescribed in the valuation method articulated by the State in the trial court proceedings which effectively broadened the range of transactions covered under the State's theory. The State's valuation method, however, remained otherwise untouched.

Id. at 49a-50a. The District Court did not care that, under the Prosecution's "valuation method", the evidence compelled Sanders' acquittal at trial; whereas, under the Tennessee appellate courts' "[re]touched" method, it convicted him on appeal.

7. The Court of Appeals affirmed. **a.** On the monetary issue, it opined that

> [b]ullion is not legal currency because it has not been minted or * * * issued by a government. And gold and silver coins, although legally a form of currency, are properly taxed as personal investment property when they are purchased not for their face value as currency, but for their intrinsic value * * * as precious metals. Thus, Sanders's theory that * * * sales tax * * * interferes with Congress's exclusive power to coin money is simply untenable.
>
> With respect to Sanders's argument that the sales tax "demonetizes" legitimate currency, * * * the tax does not in any way prevent the use of legal-tender gold and silver coins as media of exchange; it simply taxes the sale of such coins when there is evidence that they are being purchased as tangible personal property rather than * * * currency. * * *
>
> * * * [I]t is necessary to examine the "economic essence" of the transaction * * * . The evidence at trial clearly established that the transactions * * * were based on the intrinsic value of the coins * * * .

Id. at 17a-18a. The court nowhere identified on what theory specie the Constitution and Congress have declared to be money can be reduced to taxable "tangible personal property" by dint of State statutes or judicial decisions.

b. As to due process, the court rejected the *Mallas* cases, because there

> the complex statutory provisions * * * were legitimately subject to contrary interpretations that were both reasonable and well-supported. In this case, both the Tennessee court of appeals and the federal district court agreed that the statutory provision at issue was not ambiguous, and noted that other [States'] courts * * * have all agreed that transactions of the kind at issue in this case are subject to state sales tax.

App. at 11a-12a. The court did not acknowledge the paradox that, although (by its lights) "the statutory provision * * * was not ambiguous", it was not applied to exchanges of specie for FRNs according to its plain language – and, indeed, by everyone's agreement cannot be so applied – but had to be construed at different stages of this case according to three different theories of liability: the "investment" theory (at trial), the "intrinsic-value" theory (in the Tennessee appellate courts and the District Court), and the Court of Appeals' notion that the "investment" and "intrinsic-value" theories are "variant[s]" of each other. *See post*, at 14.

The Court of Appeals recited from *United States v. Lanier*, 520 U.S. 259, 266 (1997), that "due process bars courts from applying a novel construction of a criminal statute that neither the statute nor any prior judicial decision has disclosed to be within its scope", yet concluded that "the lower courts did not convict Sanders based on a novel construction * * * but rather interpreted the * * * tax * * * consistent with * * * administrative opinions and judicial decisions from other states". App. at 13a. The court rejected Sanders' objection that these decisions were from *other* States by claiming that,

> [u]nder Sanders's theory, due process would preclude courts from interpreting statutes in the context of individual cases by providing the first defendant prosecuted * * * with a constitutional defense: the court could not interpret the statute in the first instance (and thereby set a precedent for subsequent cases) because no "prior judicial decision" had construed the "very statute" at issue. Such an approach is simply untenable.

Id. at 14a. The court did not notice that this reasoning threw out *Lanier* and the *Mallas* cases, which preclude courts from interpreting ambiguous tax statutes for the first time only *in criminal prosecutions,* instead requiring new precedents to be set in administrative or civil contexts. *See post,* at 21-25.

The Court of Appeals then contended that the Tennessee Attorney General's opinion was "the closest Tennessee authority". App. at 14a-15a. It did not explain how that opinion could be used against Sanders when the trial court had ruled, and the Prosecution conceded (and never appealed), that it was not binding on him. *See ante,* at 5.

c. Finally, the Court of Appeals noted the warning in *Dunn v. United States,* 442 U.S. 100, 106-07 (1979), that

> [t]o uphold a conviction on a charge * * * no[t] presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established

> than a defendant's right to be heard on the specific charges of which he is accused. * * * [A]ppellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial.

App. at 16a n.1. But it contended that, because

> the coins and bullion * * * were based on their intrinsic, rather than their representative, values, the state appellate courts did not err in finding the facts sufficient, as a matter of law, to allow a rational trier of fact to find Sanders guilty * * * . Contrary to Sanders's assertions, the "intrinsic-value" test for taxable sales *is* simply a variant of the "investment-theory" test advanced by the state at trial. That a coin is sold for its intrinsic value rather than its face value generally indicates investment intent on the part of the buyer, and the lack of such intent, though perhaps admissible as an affirmative defense, is not a reason for exempting from tax the sale of valuable coins and metals that will, in the vast majority of cases, never be used as currency.

Id. at 20a (footnote omitted). The court, however, did not acknowledge that the Prosecution never proved to the jury through "evidence adduced at trial" that any of Sanders' exchanges were based upon "intrinsic values", because it never claimed that "intrinsic value" was a test for taxability, never defined what "intrinsic value" is, never contended that its "investment" theory was a "variant" of the "intrinsic-value" theory or that a coin's being exchanged for its "intrinsic" rather than its face value "generally indicates investment intent", never presented a witness who testified about the "intrinsic-value" theory, never sought a jury instruction on that theory, and never argued that theory to the jury or the trial court – so that the jury (as well as Sanders and that court) never had any inkling that "intrinsic value" was at issue.

Neither was the Court of Appeals disquieted because no one else had ever equated the "investment" and "intrinsic-value" theories: not the Prosecution or trial court – which used only the "investment" theory; not the Tennessee appellate courts – which interjected the "intrinsic-value" theory because the Prosecution had failed to prove the "investment" theory at trial; not the District Court – which admitted that the Tennessee appellate courts "chose to eliminate the element of customer intent, as prescribed in the valuation method articulated by the State in the trial court"; and not even the Court of Appeals – which speculated that proof of a customer's lack of "investment" intent was only "*perhaps* admissible as an affirmative defense", showing that it did not know (or care) what the parameters of Sanders' liability might be.

The court then rejected Sanders' argument that the Prosecution

> relied not on the "intrinsic value" theory adopted by the Tennessee appellate courts, but on * * * insufficient evidence of his customers' "investment intent." * * * [W]e conclude that investment intent was not an element of the crime * * * . The government attributed investment intent to Sanders's customers because they purchased the coins for amounts far greater than * * * the coins' face value as currency. Because the intrinsic value of the coins sold far

> exceeded the coins' value as currency, the government referred to the purchase of coins with "investment intent" as a proxy for purchases based on a coin's intrinsic value. Thus * * * the government's alleged failure to produce sufficient evidence of investment intent at trial, even if proven, would not undermine the legitimacy of Sanders's conviction.

Id. at 20a-21a. The court did not identify where in the trial record the Prosecution (or trial court) ever disavowed "investment intent" as "an element of the crime", or "referred to the purchase of coins with 'investment intent' as a proxy for * * * intrinsic value". In fact, although every customer testified about reasons for his exchanges, none said a word about "intrinsic value". *See id.* at 132a-33a, 139a-41a.

Now Sanders petitions for a writ of certiorari.

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REASONS FOR ALLOWANCE OF THE WRIT

This case not only travesties the judicial process as to Sanders, but threatens Congress's power to declare what shall be money, every person's right not to be indicted for crimes defined only at trial, and every defendant's right to have a jury decide his case as tried, rather than be convicted on the basis of a case first fabricated on appeal. The decisions of all the courts below refused to apply to Sanders' claims clearly established federal monetary law and this Court's rulings on monetary law and due process. And the Court of Appeals' opinion splits the Circuit Courts as to whether using a criminal prosecution as the pioneering vehicle to construe an ambiguous tax statute denies due process.

I. Contrary to the Court of Appeals (App. at 17a), the conclusion that taxing moneychanging interferes with Congress's powers is not "untenable", but instead compelled by the Constitution, Congressional (and Tennessee) statutes, and this Court's most famous precedents on monetary law.

A. Congress's monetary power is plenary. *Compare* U.S. Const. art. I, § 8, cl. 5 *with* § 10, cl. 1; *and Norman v. Baltimore & O.R.R.*, 294 U.S. 240, 303 (1935). Congress's monetary system consists of FRNs and base-metallic, silver, and gold coins. 12 U.S.C. § 411; 31 U.S.C. §§ 5112(a)(1-6), 5112(b); 31 U.S.C. §§ 5112(a)(7-10), 5112(e). All are equally "money", in that all are denominated in "dollars", and "United States money is expressed in dollars". 31 U.S.C. § 5101. *See Bronson v. Rodes,* 74 U.S. (7 Wall.) 229, 254 (1869). All are legal tender. U.S. Const. art. I, § 10, cl. 1 (gold and silver coin); 31 U.S.C. §§ 5103 (all coins and currency), 5112(h) (all coins). Bullion, too, is money. *See Bronson,* 74 U.S. (7 Wall.) at 249-50.[7] And, under Tennessee law, United States coins and Krugerrands are money. Tenn. Code

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[7] Also assimilating bullion to coin is 18 U.S.C. § 485, which prohibits counterfeiting "any gold or silver bar coined or stamped at any mint or assay office of the United States". Congress's power to punish counterfeiting includes only "the current Coin of the United States". U.S. Const. art. I, § 8, cl. 6. Therefore, extension of the prohibition to "bar[s]" assimilates them to "Coin", or to the "Money" Congress may "coin" (and punish the counterfeiting of) pursuant to art. I, § 8, cl. 5. *See United States v. Marigold,* 50 U.S. (9 How.) 560 (1850).

§ 47-1-201(24). So, Tennessee must recognize United States silver and gold coins and bullion as money. U.S. Const. art. VI, cl. 2. And Tennessee and federal courts must enforce the State's statute as to Krugerrands.

B. Taxation of moneychanging triply interferes with Congress's power: *First,* it taxes instruments of federal monetary policy (silver and gold coins). *Compare, e.g., Brown v. Maryland,* 25 U.S. (12 Wheat.) 419, 444 (1827) ("a tax on the sale of an article * * * is a tax on the article"), *with McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 425-36 (1819), *and Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S. 685, 690-92 (1965). ***But no State may tax any instrument of federal monetary policy.*** *McCulloch, ante, and Osborn v. Bank of the United States,* 22 U.S. (9 Wheat.) 738 (1824) (national bank); *New York ex rel. Bank of New York v. Board of Supervisors,* 74 U.S. (7 Wall.) 26 (1869) (paper money). Because "[t]he power to tax involves the power to destroy", taxation of exchanges of FRNs for specie implies a State power to "defeat and render useless" the superior power of Congress to declare what shall be money. *Compare McCulloch,* 17 U.S. (4 Wheat.) at 431 *with* U.S. Const. art. VI, cl. 2.

Second, sales tax treats FRNs and base-metallic coins as the only official money in Tennessee, demonetizing specie. But the State's sole monetary authority is to *make* no "Thing but gold and silver Coin a Tender". U.S. Const. art. I, § 10, cl. 1. The Court of Appeals wrongly denied that sales tax "demonetizes legitimate currency", because it does "not * * * prevent the use of legal-tender gold and silver coins as media of exchange; it simply taxes the sale of such coins when there is evidence that they are being purchased as tangible personal property rather than * * * as currency". App. at 17a-18a. But –

- At issue is not what people can do with specie in *other* transactions, but how it fared in *Sanders'* exchanges. Tennessee treated them as "sales" of "tangible personal property" in which the "sales price", "valued in money", was the face value of FRNs involved. Tenn. Code §§ 67-6-102(26), 67-6-102(24). This defined FRNs as "money", and demonetized specie. Indeed, throughout its opinion the Court of Appeals demonetized specie by talking about "intrinsic values" *measured in FRNs as the sole legal standard of monetary value.*

Long ago, however, this Court repudiated the "intrinsic-value" theory as a basis for demonetizing gold coins in favor of a less-valuable paper currency:

> One owing a debt may pay it in gold coin or legal-tender notes of the United States, as he chooses * * * . A coin dollar is worth no more for the purposes of tender in payment of an ordinary debt than a note dollar. *The law has not made the note a standard of value any more than coin.* It is true that in the market, as an article of merchandise, one is of greater value than the other; but as money, that is to say, as a medium of exchange, the law knows no difference between them.

Thompson v. Butler, 95 U.S. 694, 696 (1878) (emphasis added).[8] The Court of Appeals grotesquely misread

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[8] The present coinage laws reflect this rule. That the Secretary of the Treasury may sell specie coins to the public at "the market value of the bullion" (their "intrinsic value", in the

Thompson. App. at 17a. *Thompson* held this Court powerless to discriminate between gold coin and paper currency, where the gold was used to satisfy a judgment on a "gold-clause contract". Sanders' exchanges were "gold-clause contracts". *See* App. at 124a-27a, 130a-32a. If this Court cannot discriminate between gold coin and paper currency in such a context, how can Tennessee or the courts below do so?

- Semantic tricks cannot demonetize specie, because its monetary character derives from the "impress of sovereign power" imparted by Congress and the Constitution. *Compare, e.g., Riley v. National Fed'n of the Blind,* 487 U.S. 781, 795-96 (1988), *with Norman v. Baltimore & O.R.R.,* 294 U.S. 240, 303 (1934), *and Ling Su Fan v. United States,* 218 U.S. 302, 311 (1910). Thus, the Court of Appeals' "economic-essence" theory is impertinent. App. at 18a. The Constitution and Congress have fixed specie's "economic essence" as *monetary*; and, under *Thompson,* no court may deny that character on the plea that "as an article of merchandise, [specie] is of greater value than [paper currency]". Gold and silver coin are *always* "money" and "currency" *perforce of legal definition,* no matter what their "price" in some other medium of exchange or what supposedly "nonmonetary" use some holder may make of them.[9]

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lower courts' jargon) does not detract from the coins' monetary character. *Compare* 31 U.S.C. §§ 5112(f)(1) *and* 5112(i)(2)(A) *with* 5112(h).

[9] That any of Sanders' customers acquired specie for "investment" could not detract from its monetary character. For "investment" imports only the hope that specie will appreciate relative to FRNs. Yet, when a customer acquired specie, it was

Third, sales tax discriminates against exchanges of FRNs for specie, but not base-metallic coins, thereby discouraging the use of specie on an equal basis with FRNs and base metals. Indeed, with the Court of Appeals' blessing, States within the Sixth Circuit may tax exchanges of specie at 100% of their value, eliminating its circulation altogether.

In sum, unless this Court intervenes, the Sixth Circuit has stood *Veazie Bank v. Fenno,* 75 U.S. (8 Wall.) 533 (1869), on its head: Rather than Congress's controlling the States' monetary policies, now a State can nullify Congress's powers whenever it sticks a demonetizing label on specie – or on base-metallic coins or even Federal Reserve Notes.

II. Contrary to the Court of Appeals (App. at 13a), Sanders' conviction offends the rule that "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope". *United States v. Lanier,* 520 U.S. 259, 266 (1997). *See also, e.g., Colautti v. Franklin,* 439 U.S. 379, 390-91 (1979); *United States v. Harriss,* 347 U.S. 612, 617 (1954). Indeed, the court's decision is a nadir in such denials of due process, as it licenses prosecutors and appellate courts to

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already of greater value than FRNs. And, even so, under *Thompson* "as money * * * the law knows no difference between [gold and paper currency]". 95 U.S. at 696. Therefore, that the one of greater value may appreciate even more is irrelevant. If "the law knows no difference" when one is worth more than the other, it can "know[ ] no difference" when that disparity increases.

invent at trial and reinvent on appeal whatever "novel construction[s]" are expedient to obtain, and then sustain, bogus convictions.

Clearly established is that – where a tax law provides no prior notice that conduct is criminal; where a person has a nonfrivolous argument that his conduct is innocent; irrespective of whose construction of the law proves correct; and regardless of the person's intent, or a jury's determination of guilt – a criminal prosecution may not simultaneously define and punish an alleged tax crime. Instead, "the appropriate vehicle to decide [a] pioneering interpretation of tax liability is the *civil* procedure of administrative assessment". *United States v. Mallas,* 762 F.2d 361, 362-65 (4th Cir. 1985); *United States v. Harris,* 942 F.2d 1125, 1131-32, 1134-35 (7th Cir. 1991); *United States v. Dahlstrom,* 713 F.2d 1423, 1427-29 (9th Cir. 1983); *United States v. Critzer,* 498 F.2d 1160, 1160-62, 1164 (4th Cir. 1974); *United States v. Garber,* 607 F.2d 92, 95-96, 98-100 (5th Cir. 1979); *United States v. McClain,* 593 F.2d 658, 667-70 (5th Cir. 1979).[10]

Prior to Sanders' indictment, no civil, administrative, or criminal precedent in Tennessee had treated moneychanging as taxable. *Compare Dalhstrom,* 713 F.2d at 1427. Sanders had a "reasonable and well-supported", "plausible", and not "frivolous" theory that FRNs and specie are money, and that money-for-money exchanges are nontaxable. *Compare Mallas,* 762 F.2d at 364; *Critzer,* 498 F.2d at 1161. So sound is Sanders' defense that, to convict him, the Prosecution and lower courts had to invoke *three different theories, none found within the statute, each without precedent in Tennessee, and all in derogation of this Court's decisons in* McCulloch, Bank of Supervisors, Thompson, *and other monetary cases.*

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[10] The contours of a clearly established constitutional right can be gleaned from decisions of Courts of Appeals. *Lanier,* 520 U.S. at 268-69.

The Court of Appeals' attempts to evade *Lanier* and the *Mallas* cases are feckless. *See* App. at 11a-16a. "The government's assertion that the law was clear" not only was "contradicted by the evidence at * * * trial" (*see Dahlstrom*, 713 F.2d at 1427), but also was demolished by later court decisions. Because everyone agreed that the law could *not* be applied as written, the Prosecution interpolated its "investment" theory, the Tennessee appellate courts their "intrinsic-value" theory, and the Court of Appeals its "intrinsic-value-implies-investment" theory. Such prosecution by interpolation of liability not found within the statute or *pre*-indictment case-law denied Sanders due process. Moreover, such interpolation revolutionizes criminal jurisprudence by plasticizing potentially every statute, surprising defendants with new theories of liability at trial, then sandbagging them with newer theories on appeal.

Worse yet, the lower courts' reliance on decisions from other States to construe Tennessee law for the first time in Sanders' case reads individual State responsibility out of the Fourteenth Amendment: One State can deprive a person of due process under its law because of some case in another State under that State's law – in which case the defendant took no part, but which in effect collaterally estops him from denying the novelty of the construction of the statute applied to him.

That courts in other States had applied their laws to moneychanging must be irrelevant to Sanders' prosecution. "[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither *the statute* nor any prior judicial decision has fairly disclosed to be within *its* scope". *Lanier,* 520 U.S. at 266 (emphasis added). None of those other State courts had interpreted Tennessee law; and their reasoning as to their statutes did not bind Tennessee courts as to Tennessee law. So, for the courts below to inject those foreign decisions into Tennessee case-law amounts to prosecution by extrapolation, which denies Sanders due process.

Equally egregious is the Court of Appeals' notion that the opinion of Tennessee's Attorney General was "the closest Tennessee authority". App. at 14a. If a lawyer's argument, rather than "the statute [ ]or any prior judicial decision", can justify prosecution, then prosecutors' imaginations will set the limits to due process. Moreover, the trial court ruled that the opinion "is not law" and "is not binding" on Sanders; and the Prosecution conceded that it "is not binding as case authority or as a statute". *Id.* at 127a-28a. This estops Respondents and the lower courts from equating the opinion to a *pre*-indictment "regulation, judicial decision, or even revenue ruling". *See Mallas,* 762 F.2d at 364.[11]

Bereft of precedent, the Court of Appeals conjured "common sense". App. at 14a. But its notion of "sense" was the "intrinisic-value-implies-investment" theory that lacks any basis in the sales-tax statute, and conflicts with federal monetary law and this Court's cases. This reduces "common sense" to whatever Johnny-come-lately theory prosecutors or appellate courts can concoct, *post*-indictment or even *post*-conviction. And that flies in the face of *Lanier* and the *Mallas* cases.

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[11] Moreover, Sanders did not know of the opinion prior to the exchanges at issue. App. at 127a. Had he known, such knowledge would have created a question only of negligence, not criminal intent. *See Dahlstrom,* 713 F.2d at 1427-28.

Finally, by arguing that a statute denies due process only if it "lull[s] the potential defendant into a false sense of security, giving him no reason even to suspect that his conduct might be within its scope" (App. at 15a), the Court of Appeals has denied that *any* novel construction could violate due process, because – imagination having no limits – every construction, no matter how lawless, could possibly be "suspect[ed]". On this reasoning, Sanders would not have been "lull[ed]" only if he had been required, as a matter of law, to expect that the Prosecution would employ a theory with no basis in the statute, with no precedent in Tennessee, and contrary to federal and Tennessee laws and judicial decisions that make specie money; that the Tennessee appellate and federal courts would inject new theories into the case *post*-conviction; and that those courts would treat decisions from other States as *ersatz* "precedents" in Tennessee. No one waives the right to due process, however, by presuming that prosecutors and judges might actually obey the law.

In sum, unless this Court intervenes, in the Sixth Circuit the due process of *Lanier* and the *Mallas* cases is a dead letter – licensing prosecutors and appellate judges to invent and reinvent criminal laws as they go along.

III. The decisions of the courts below offend this Court's ruling in *Dunn v. United States* that

> [t]o uphold a conviction on a charge * * * no[t] presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused. * * * [A]ppellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial.

442 U.S. 100, 106-07 (1979). "[P]rosecutors and courts are required to determine and acknowledge [at trial] exactly what the alleged crime *is*. They may not allow the facts to define the crime through hindsight after the case is over." *United States v. Minarik*, 875 F.2d 1186, 1196 (6th Cir. 1989). *See* the Court of Appeals' rejection of these rulings *in* App. at 16a n.1.

The courts below impermissibly "revise[d] the basis on which [Sanders was] convicted", because they realized that no rational jury could have found him guilty on the legal theory and evidence presented at trial. *See Jackson v. Virginia*, 443 U.S. 307, 319, 324 (1979). The indictment charged Sanders with evading sales tax "exceeding five thousand dollars" – an essential element of the crime. *See Coffee, Ridley & Short v. State*, 11 Tenn. 283, 286 (1832); *Timms v. State*, 44 Tenn. 138, 140 (1867). At trial, the Prosecution argued that exchanges of bullion were always taxable, but conceded that exchanges of coins were taxable *only* if the customer had "investment" intent. App. at 132a. No customer testified that he had communicated such an intent to Sanders, or that he knew what Sanders' intent was. App. at 133a-34a & n.34.[12] Exchanges of bullion had a total value of $22,608.00 in FRNs: Batey ($510.00, $2,430.00, and $2,322.00), Thompson ($6,000.00 and $6,000.00), and Smith ($3,420.00 and $1,914.00). Exchanges of coins with supposed "investment" intent totalled $13,020.33 in FRNs: Batey ($5,000.33 and $8,020.00). Tax on all these exchanges was $2,711.21. App. at 24a, 77a, 137a. (The Prosecution could not rely on Webb's or Verhaeghe's exchanges, because Webb's involved "promotional gifts", and Verhaeghe's purpose was to move money internationally. *Id.* at 140a.) No reasoning jury could find that $2,711.21 "exceed[ed] five thousand dollars". And the Prosecution having failed in its proof, Sanders' conviction had to be voided. *See Greene v. Massey*, 437 U.S. 19, 24 (1978).

To salvage the conviction, the Tennessee appellate courts and the District Court adopted the "intrinsic-value" theory, by which every exchange became taxable regardless of the customer's intent. App. at 47a-50a, 69a,

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[12] The trial court allowed the customers to testify that they had not intended to "sell" Sanders FRNs for specie – which the jury took as evidence of Sanders' intent to sell coins for "investment and profit". App. at 135a-39a. Sanders objected, because imputing the customers' secret intent to him was nonrational, and allowing the jury possibly to convict on that basis denied due process. *See Leary v. United States*, 395 U.S. 6, 31-32 (1969); *Mills v. Maryland*, 486 U.S. 367, 376 (1988); *Yates v. United States*, 354 U.S. 298, 311-12 (1957). The courts below ruled against him. App. at 139a, 25a-26a, 50a-52a, 71a, 89a-91a. Although this matter might be set out as a separate denial of due process, Sanders subsumes it under the third QUESTION PRESENTED, as it relates to the Prosecution's failure of proof.

86a-88a. Then, confronted with the contradiction between this shell game and *Dunn*, the Court of Appeals discovered what no one else imagined: that "the 'intrinsic-value' test * * * *is* simply a variant of the 'investment-theory' test", because exchanging a coin "for its intrinsic value generally indicates investment intent". App. at 20a (footnote omitted). Even the District Court knew better, admitting that the "intrinsic-value" theory "effectively broadened the range of transactions covered under" "the valuation method articulated by the State in the trial court". *Id.* at 49a-50a. How "the range" could have been "broadened" were the tests simply "variant[s]" of one another passes understanding. Morever, the Court of Appeals' notion is nonsensical. Individuals could acquire specie to pay gold-clause contracts (as in *Thompson*) or to move funds internationally (as did Verhaeghe), not as "investments", even were the exchange rates with FRNs not at par; or (as did Webb and Thompson) they could use specie as gifts whatever the rates. Thus, no rational jury could conclude that exchanging specie for its "intrinsic value" *simpliciter* "generally" proves "investment" intent. (And the Prosecution never so argued to the jury.)

The lower courts' fatal fallacy is that *the "intrinsic-value" theory of liability never surfaced at trial, under any name*. The Prosecution adduced *no* testimony that any customer acquired specie for its "intrinsic value", or even understood what "intrinsic value" means. It *never* proved any exchanges based upon "intrinsic value", because it *never* identified "intrinsic value" as its test, *never* defined "intrinsic value", *never* equated the "investment" with the "intrinsic-value" theory, *never* sought a jury instruction on "intrinsic value", and *never* argued the "intrinsic-value" theory to the jury or trial court. *And Sanders had no opportunity to defend at trial against the "intrinsic-value" theory, as it was never raised.*

Blatantly false is the Court of Appeals' claim that

> investment intent was not an element of the crime * * * . The government attributed investment intent to Sanders's customers because they purchased the coins for amounts far greater than * * * the coins' face value as currency. * * * [T]he government referred to the purchase of coins with "investment intent" as a proxy for purchases based on a coin's intrinsic value.

App. at 20a-21a. Neither the Prosecution nor trial court made any such attribution or reference. The key Prosecution witness testified that specie is nontaxable unless "you hold it for an investment". *Id.* at 132a. Against Sanders' *post*-trial motions the Prosecution argued that his customers "bought [gold and silver] for investment". *Id.* at 144a. And the trial court denied those motions because "the jury apparently determined that [Sanders] * * * was buying and selling collectors coins for the purpose of investment". *Id.* at 139a. Any contrary reading of the record is fantasy.

In sum, the Court of Appeals' " 'intrinsic-value' test * * * *is*" no more "simply a variant of the 'investment-theory' test" than a silk purse "*is* simply a variant" of a sow's ear.

Yet, in the Sixth Circuit, nullification of *Dunn* now depends only on how far out of shape prosecutors and courts can twist *"is"*. This is wax-nose jurisprudence at its greasiest.

◆

CONCLUSION

For these reasons, this Court should grant Sanders' petition, and either reverse summarily (particularly under *Lanier, Dunn,* or both); or set this case for full briefing and oral argument.

Respectfully submitted,

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APPENDIX

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2000 FED App. 0237P (6th Cir.)
File Name: 00a0237p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FRANKLIN SANDERS,
Petitioner,
v.
WILLIAM E. FREEMAN, JR.
and CHARLES BURSON,
Respondents.

No. 98-6512

Appeal from the United States District Court for the Western District of Tennessee at Memphis.
No. 96-02698 – Julia S. Gibbons, Chief District Judge.

Argued: March 7, 2000

Decided and Filed: July 19, 2000

Before: BOGGS and COLE, Circuit Judges; and ZATKOFF, District Judge.*

COUNSEL

ARGUED: Edwin Vieira, Jr., Manassas, Virginia, for Appellant. Ellen H. Pollack, ASSISTANT ATTORNEY [2]

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*The Honorable Lawrence P. Zatkoff, Chief United States District Judge for the Eastern District of Michigan, sitting by designation.

GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellees. **ON BRIEF**: Edwin Vieira, Jr., Manassas, Virginia, Edward Witt Chandler, Mountain Home, Arkansas, for Appellant. Ellen H. Pollack, ASSISTANT ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellees.

OPINION

BOGGS, Circuit Judge. The petitioner, Franklin Sanders, is a businessman who, prior to his conviction, worked as a retail dealer in Memphis, Tennessee selling gold and silver coins and bullion for cash. He sought a writ of habeas corpus following his conviction for unlawfully depriving the State of Tennessee in its collection of sales tax revenues. The district court denied Sanders's petition and granted summary judgment for the state. We affirm.

I

The following excerpt from the Tennessee Supreme Court's opinion affirming Sanders's conviction accurately summarizes the facts giving rise to his indictment.

> In 1986, the [Tennessee] Department of Revenue discovered that [Sanders], who was not registered with the Department as a "dealer" [of coins and precious metals] under the sales tax statute, was advertising as a dealer in gold and silver bullion and coins and precious metals. The Department also discovered that the state of Arkansas had obtained a judgment against

[Sanders] for sales tax owed on the sale of gold and silver coins and bullion at his place of business in West Memphis, Arkansas. While engaged in business in West Memphis, [Sanders] placed an advertisement in a Memphis newspaper, which stated: "[i]f you're a Memphis buyer, you save six percent sales tax on any purchase mailed to Tennessee." Soon after the state of Arkansas obtained its [3] judgment for $66,223.51 for sales tax due, [Sanders] moved his business to Memphis, where he operated under various trade names including "Franklin Sanders Moneychangers" and "Money for Metals."

In July 1986, an agent of the Department purchased several bars of silver from [Sanders] at his place of business in Memphis. [Sanders] did not file a monthly sales tax return for the month of July. In September 1986, when the agent bought several more bars of silver from [Sanders], he asked [Sanders] if sales tax was due on the transaction. [Sanders] responded that no sales tax was due because the defendant was purchasing the agent's Federal Reserve notes with silver. As a record of each transaction, [Sanders] gave the agent a "trade confirmation," which stated:

> [O]ur business legally is buying notes and paying for them in gold and silver. Our acceptance of Federal Reserve notes (the green paper you carry in your billfold) in exchange for gold and silver money is a function of our common law 'moneychanging' only, and is not an admission on our part, expressly or implicitly, that we recognize them as lawful or constitutional money.

> A search of [Sanders's] business premises on September 18, 1986, by Revenue Department agents produced evidence of transactions in which the defendant had [been] paid a total of $945,610.69 for U.S. gold coins, U.S. silver coins, Krugerrands and silver bars. During the search, the agents also found evidence of a letter written by [Sanders] in which he discussed the applicability of the Tennessee sales tax on the transactions. The letter, which was written after the state of Arkansas had obtained its judgment against the defendant, included the following:
>
>> George, I realize that Arkansas can register this judgement [sic] in Tennessee and I realize that they may be able to cause me some trouble, but I don't [4] own anything, nothing is in my name, I just have to hope that that is enough protection. As to the good sales tax people in Tennessee, I am no longer selling anything. Relying on the definition of Federal Reserve Notes at 12 U.S.C. 411, I am buying "obligations" and paying for them in lawful gold and silver money. This makes my invoices a bit hard to explain to my customers, but I think it will keep the State of Tennessee at bay.

State v. Sanders, 923 S.W.2d 540, 542 (Tenn. 1996).

Based on the facts recited above, on September 19, 1989, a grand jury issued a two-count indictment charging Sanders with (1) delaying the State by design in the collection of its lawful revenue from December 1, 1983, through November 1, 1986, and (2) depriving the State by design of the realization of its lawful revenue for the same period, both in violation of Tennessee Code Annotated (TCA) § 67-1-1440(d). The indictment alleged that, during the period charged, Sanders was selling gold and silver coins and bullion in Memphis without collecting sales tax as required by the Tennessee Code.

A jury convicted Sanders on both counts of the indictment, and a sentencing hearing was held on June 18, 1992. The trial court sentenced Sanders to one year of incarceration and ordered him to pay the state $73,000 in restitution. The court then suspended all but thirty days of the sentence, placed Sanders on probation for six years, and ordered him to complete 1000 hours of community service. The Tennessee Court of Criminal Appeals affirmed Sanders's conviction for *depriving* the State of revenue, but reversed his conviction for *delaying* the collection of revenue exceeding $5,000 on the grounds that the delaying conviction constituted double jeopardy. *State v. Sanders,* 1994 WL 413465 (Tenn. Crim. App. 1994).

The Tennessee Supreme Court granted Sanders's application for review and, on May 28, 1996, issued an opinion affirming his conviction and sentence as amended by [5] the court of appeals. In its opinion, the Tennessee Supreme Court specifically held that the sale of gold and silver coins and bullion for their intrinsic value as metals, rather than for their representative values as currency, constitutes a taxable sale of "tangible personal property" under Tennessee law. *See State v. Sanders,* 923 S.W.2d at 543. The court further held that Sanders's conviction did not violate due process, finding that, as a matter of law, the Tennessee sales tax provision gave him "fair warning" that the transactions to which he was a party were subject to state sales tax. *See ibid.*

Having exhausted all opportunities for review in the state courts, Sanders filed his petition for a writ of habeas corpus in the district court. The state filed a motion for summary judgment along with various supporting documents and, after considering Sanders's responses and cross-motions, the district court granted the state's motion on November 24, 1997. Sanders's motion for rehearing, which the district court construed as a Rule 59(e) motion to alter or amend the judgment, was denied and Sanders filed a timely notice of appeal to this court. On appeal, Sanders raises seven assignments of error in which he challenges various aspects of his conviction and sentence.

II

Section 2254 of Title 28 of the United States Code creates a right to petition a federal district court for habeas corpus relief from a state conviction. Section 2254(a) provides that a petitioner may seek habeas relief if he is "in custody in violation of the Constitution or laws or treaties of the United States." Because Sanders was in custody at the Shelby County Correctional Center in Memphis, Tennessee when he filed his petition for habeas corpus on July 8, 1996, this court has jurisdiction over this case even though Sanders was not in custody at the time he filed this appeal. *See Carafas v. Lavelle,* 391 U.S. 234, 237 (1968) (stating that "[t]he federal habeas corpus statute requires that the applicant must be 'in custody' when the application for habeas corpus is filed" and holding that, because jurisdiction over a habeas corpus action [6] attaches at the time the petition is filed, the petitioner's incarceration at the time he filed his petition in the district court established federal jurisdiction over his habeas case despite his subsequent unconditional release from custody); *DePompei v. Ohio Adult Parole Auth.*, 999 F.2d 138, 140 (6th Cir. 1993) (holding that the court had jurisdiction over a petitioner who was on parole, a form of custody, when he filed his habeas petition in the district court).

Standard of Review

This court reviews de novo the district court's grant of summary judgment for the state. *See Terry Barr Sales Agency, Inc. v. All-Lock Co., Inc.*, 96 F.3d 174, 178 (6th Cir. 1996). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(c). To defeat a motion for summary judgment, the non-moving party must set forth specific facts sufficient to show that a reasonable factfinder could return a verdict in his favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Because Sanders's case was decided in the district court under 28 U.S.C. § 2254, this court must review the district court's decision in light of the standard of review for habeas corpus actions set forth in § 2254(d). Section 2254(d) provides that an application for a writ of habeas corpus "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> [7] (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

28 U.S.C. § 2254(d).

In its recent decision in *Williams v. Taylor*, 120 S. Ct. 1495 (2000), the Supreme Court resolved a disagreement among the federal appellate courts regarding the proper interpretation of the standard for habeas corpus relief set forth in § 2254(d)(1). In *Williams*, Justice O'Connor, stating the opinion of the Court on this point (*see id.* at 1516), discussed the language in § 2254(d) that outlines the degree to which federal habeas courts should defer to state court decisions. The Court held that, in order for the writ to issue, a state-court decision must be contrary to Supreme Court precedent in the sense that:

> [T]he state court arrive[d] at a conclusion opposite to that reached by this Court on a question of law. . . . [or] the state court confront[ed] facts that are materially indistinguishable from a relevant Supreme Court precedent and arrive[d] at a result opposite to ours.

Williams, 120 S. Ct. at 1519. As the Court went on to explain, to be entitled to habeas relief under § 2254(d), a petitioner must show that the state court's decision was "substantially different from the relevant precedent of [the Supreme] Court." *Ibid.*

Justice O'Connor elaborated further on the application of this standard with examples concerning a habeas petitioner's claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). *See id.* at 1519-20. She explained that habeas relief would be warranted on an ineffective assistance claim if the state court rejected the prisoner's claim because it imposed a different burden of proof on the petitioner than the Supreme Court had determined was proper or because, confronted with facts "materially indistinguishable from a decision of [the Supreme] Court," the state court "nevertheless arrive[d] at a [8] result different from [the Court's] precedent." *Id.* at 1519-20. She emphasized, however, that a "run-of-the-mill state-court decision applying the correct legal rule from [its] cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Id.* at 1520. Thus, in the context of a claim for ineffective assistance of counsel under *Strickland v. Washington*, a "state-court decision on a prisoner's ineffective assistance claim [that] correctly identifies *Strickland* as the controlling legal precedent and, applying that framework, rejects the prisoner's claim. . . . [would] [q]uite clearly . . . be in accord with our decision in *Strickland* as to the legal prerequisites for establishing an ineffective-assistance claim, *even assuming the federal court considering the prisoner's habeas application might reach a different result applying the* Strickland *framework itself.*" *Ibid.* (emphasis added).

Given the Supreme Court's interpretation of § 2254(d)(1) in *Williams*, this court should only grant Sanders's request for habeas corpus relief under this section if the Tennessee courts either failed to apply clearly established federal law to Sanders's claims, issued a decision that was "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings," or denied his claims even though the facts of his case were "materially indistinguishable" from a case in which the Supreme Court granted relief. 28 U.S.C. § 2254(d).

In determining whether the Tennessee Supreme Court's decision affirming Sanders's conviction was "contrary to, or involved an unreasonable application of, clearly established federal law" under § 2254(d) and the Supreme Court's decision in *Williams*, this court is required to presume that the state court's factual findings are correct unless Sanders is able to establish certain enumerated circumstances. *See* 28 U.S.C. § 2254(e). Specifically, a federal habeas court may not hold an evidentiary hearing to consider issues of fact raised by a petitioner unless the claim for a hearing rests on one of the following grounds:

> [9] (A) . . . (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

Sanders's Due Process Claims

It is well established that a statute must give a defendant "fair notice that his contemplated conduct is forbidden." *United States v. Harriss*, 347 U.S. 612, 617 (1954). Specifically, an individual may not be prosecuted for violating tax laws when the statutory provisions at issue are "vague or highly debatable" or the governing law is "completely unsettled by any clearly relevant precedent." *United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974) (finding that a defendant who had been informed by a government agency that she would not be subject to taxation under an ambiguous provision of the tax code lacked the intent necessary to support a conviction for tax evasion). In *United States v. Mallas*, 762 F.2d 361 (4th Cir. 1985), another case involving the scope and application of an ambiguous tax law, the Fourth Circuit cited *Critzer* in holding that, "where the law is vague or highly debatable, a defendant - actually or imputedly - lacks the requisite intent to violate it." *Mallas*, 762 F.2d at 363 (citations omitted).

In challenging his conviction, Sanders relies heavily on *Mallas* and its progeny, arguing that the state of Tennessee failed to provide him with notice in the form of a judicial decision, regulation, or revenue ruling that his business transactions were subject to state sales tax. In the *Mallas* line [10] of cases, however, the reviewing courts found that the complex statutory provisions at issue were legitimately subject to contrary interpretations that were both reasonable and well-supported. In this case, both the Tennessee court of appeals and the federal district court agreed that the statutory provision at issue was not ambiguous, and noted that other courts that have interpreted similar statutory provisions have all agreed that transactions of the kind at issue in this case are subject to state sales tax. *See, e.g., State v. Sanders*, 923 S.W.2d 540, 544 (Tenn. 1996) (affirming Sanders's conviction and noting that "the relevant provisions of Tennessee's Code are rather clear in their applicability to the defendant's transactions"); *see also Association of Ala. Prof'l Numismatists, Inc. v. Eagerton*, 455 So. 2d 867 (Ala. Civ. App. 1984); *Revenue Cabinet v. Saylor*, 738 S.W.2d 426 (Ky. Ct. App. 1987); *Michigan Nat'l Bank v. Department of Treasury*, 339 N.W.2d 515 (Mich. Ct. App. 1983); *Scotchman's Coin Shop, Inc. v. Administrative Hearing Comm'n*, 654 S.W.2d 873 (Mo. 1983) (en banc).

The provisions of the Tennessee Code at issue in this case, TCA §§ 67-6-201(1) and 67-6-202, provide that anyone who "[e]ngages in the business of selling tangible personal property at retail in [Tennessee]" must pay sales tax on those transactions. Section 67-6-102(29) then defines "tangible personal property" as "personal property, which may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses. . . . [It] does not include stocks, bonds, notes, insurance, or other obligations or securities." Section 67-1-1440(d) of the Code makes it a felony for:

> any person to delay, hamper, hinder, impede, obstruct or thwart the state of Tennessee in the collection of any of its lawful revenue, or to deprive the state of the realization of such revenue at the time it is lawfully entitled thereto by any artifice, design, false weight or measure, stratagem, or by the falsification of any record, report or return required by law.

[11] Although the Tennessee Code does not define "intangible" (i.e. non-taxable) personal property, intangible property as used in the law of taxation means "such property as has no intrinsic and marketable value, but is merely the representative or evidence of value, such as certificates of stock, bonds, promissory notes, copyrights, and franchises." *Sanders,* 923 S.W.2d at 542 (quoting Black's Law Dictionary 809 (6th ed. 1990)).

Notice of potential tax liability may be provided by "authoritative constructions sufficiently illuminating the contours of an otherwise vague provision." *Dombrowski v. Pfister,* 380 U.S. 479, 490-91 (1965). Although the Supreme Court stated in *United States v. Lanier* that "due process bars courts from applying a *novel construction* of a criminal statute that neither the statute nor any prior judicial decision has disclosed to be within its scope," 520 U.S. 259, 266 (1997), the lower courts did not convict Sanders based on a novel construction of the statute, but rather interpreted the applicable tax provisions in a manner consistent with state administrative opinions and judicial decisions from other states. In short, the lower courts' construction of the statute was not novel, but entirely foreseeable in light of the statutory language and the many cases from other jurisdictions in which courts considering similar tax provisions have found the exchange of coins and bullion for cash to be taxable. *See, e.g., Scotchman's,* 654 S.W.2d at 873.

Sanders argues on appeal that his conviction violates due process precisely because the Tennessee courts relied on decisions from *other* states that addressed the scope and applicability of tax statutes similar to the one at issue here. Because such decisions are not "authoritative constructions" of Tennessee law under *Lanier*, Sanders argues, they did not put him on notice that his conduct was criminal and his conviction therefore violates due process. Sanders claims that, to satisfy due process, a "prior judicial decision" must have construed the "very statute in issue in the criminal case, not some other statute from some other State." Pet. Reply Br. at 8.

[12] Under Sanders's theory, due process would preclude courts from interpreting statutes in the context of individual cases by providing the first defendant prosecuted under the statute with a constitutional defense: the court could not interpret the statute in the first instance (and thereby set a precedent for subsequent cases) because no "prior judicial decision" had construed the "very statute" at issue. Such an approach is simply untenable. Moreover, even the *Mallas* opinion on which Sanders so heavily relies acknowledges that "due process does not require the prosecution to cite a litigated fact pattern directly on point," and that "a duty not articulated by regulatory language or judicial construction may nonetheless be compelled by the authoritative force of common sense." *Mallas*, 762 F.2d at 364.

In 1981, the Office of the Attorney General of Tennessee issued an opinion stating that the sale of gold and silver coins and bullion is subject to state sales tax. *See* 10 Op. Att'y Gen. 967 (1981). Thus, although there were no Tennessee cases or revenue rulings directly on point, the closest Tennessee authority agreed with courts in several other jurisdictions that Sanders's business transactions were subject to sales tax. In support of his position, Sanders cites *United States v. Harris*, 942 F.2d 1125, 1128

(7th Cir. 1991), a case in which the Seventh Circuit reversed the defendant's conviction for willful tax evasion because traditional sources of notice were ambiguous as to whether the defendant would be subject to taxation. However, the *Harris* court did not reverse solely because traditional sources of notice were ambiguous about the defendant's tax liability; in granting the defendant's request for relief, the court emphasized that the closest state authority actually *favored* the defendant's position that her income was not taxable. In this case, unlike in *Harris*, the closest state authority (the Tennessee Attorney General's opinion letter) was consistent with judicial decisions from several other states (including the Arkansas judgment against Sanders for sales tax liability) that Sanders's sales were subject to state tax.

[13] In response to the state's argument that the Attorney General's opinion letter, along with cases from other jurisdictions, properly noticed him that his sales were taxable, Sanders argues simply that the notice was not sufficiently specific or authoritative. In *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 96 (2d. Cir. 1983), however, the Second Circuit held that:

> All the Due Process clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden, and thus not *lull the potential defendant into a false sense of security, giving him no reason even to suspect* that his conduct might be within its scope.

Id. at 96 (citation omitted, emphasis added).

In this case, Sanders had many reasons to "suspect" that his conduct might give rise to tax liability. The language of the Tennessee Code, combined with the attorney general's opinion letter, several cases from other states, and the Arkansas judgment against him for the very same practice all served to place Sanders on notice that his sales were taxable in Tennessee. Moreover, the language in Sanders's "trade confirmations" and in the letter in which he discussed the sales tax law in Tennessee suggests that he was aware of his potential tax liability, but thought he might be able to avoid it by relying on semantic distinctions, hence his attempt to recharacterize his sales of coins and precious metals as "purchases" of "obligations" in the form of Federal Reserve notes. The evidence produced at trial suggests that Sanders chose to risk prosecution for tax evasion in exchange for greater profits. That his attempt to exploit the ambiguity in the tax laws failed is not a basis for granting relief under the due process clause.[1]

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[1] In a final (and unsuccessful) effort to challenge his conviction on due process grounds, Sanders argues that in affirming his conviction by reference to the "intrinsic value" (rather than the "investment") theory of taxable transactions (for a more detailed discussion of these theories, *see* [14] *infra* pp. 16-18 and n.2) the state appellate courts affirmed his conviction on grounds not presented to the jury at trial. *See, e.g., Dunn v. United States,* 442 U.S. 100, 106-07 (1979) ("To uphold a conviction on a charge that was . . . no[t] presented to a jury at trial offends the most basic notions of due process. . . . Appellate courts are not free to revise the basis on which a defendant is convicted." (emphasis added)); *see also United States v. Minarik,* 875 F.2d 1186, 1196 (6th Cir. 1989) ("Prosecutors and courts . . . may not allow the facts to define the crime through hindsight after the case is over").

[14] *Constitutionality of Imposing Sales Tax on the Sale of Gold and Silver Coins and Bullion*

Sanders relies heavily on *Thompson v. Butler*, 95 U.S. 694 (1878), to support his contention that gold and silver coins that Congress has recognized as legal tender cannot be "demonetized" and sales of such coins taxed simply because the person purchasing them intends to hold them as an investment. Sanders's argument not only defies common sense; it is not supported by the cases he cites. In *Thompson*, the Supreme Court held only that creditors could not discriminate between coin and paper currency when a debtor sought to use one or the other form of currency to satisfy a debt. *See id.* at 969 (stating that "as money, that is to say, as a medium of exchange, the law knows no difference between [paper currency and specie coins]"). In this case, unlike in *Thompson*, there is no indication that any of Sanders's customers planned to use the coins or bullion they purchased as currency. Bullion is not legal currency because it has not been minted or otherwise legitimately issued by a government. And gold and silver coins, although legally a form of currency, are properly taxed as personal investment property when they are purchased not for their face value as currency, but for their intrinsic value either as collectors' items or as precious metals. Thus, Sanders's theory that imposing sales tax on the sale of legal-tender silver and gold coins unconstitutionally interferes with Congress's exclusive power to coin money is simply untenable.

With respect to Sanders's argument that the sales tax "demonetizes" legitimate currency, it is important to note that [15] the tax does not in any way prevent the use of legal-tender gold and silver coins as media of exchange;

it simply taxes the sale of such coins when there is evidence that they are being purchased as tangible personal property rather than exchanged for use as currency. Indeed, most, if not all, of the courts that have considered this issue have held that imposing sales tax on the purchase of gold and silver coins and bullion for cash does not infringe on Congress's constitutional power to coin and regulate currency. *See, e.g., Thorne and Wilson, Inc. v. Utah State Tax Comm'n,* 681 P.2d 1237 (Utah 1984); *Revenue Cabinet v. Saylor,* 738 S.W.2d 426 (Ky. Ct. App. 1987); *Michigan Nat'l Bank v. Department of Treasury,* 339 N.W.2d 515 (Mich. Ct. App. 1983); *Scotchman's Coin Shop, Inc. v. Administrative Hearing Comm'n,* 654 S.W.2d 873 (Mo. 1983) (en banc).

In determining whether Sanders's transactions were properly taxed as sales of "tangible personal property," the Tennessee Supreme Court agreed with the Missouri Supreme Court in *Scotchman's* that it is necessary to examine the "economic essence" of the transaction to determine whether the sale of coins is taxable because it was based on the tangible (i.e. intrinsic) value of the coins' precious metal content, or not taxable because the sale price was based on the intangible value of the coins' representative value as currency. *See Sanders,* 923 S.W.2d at 543 (citing *Scotchman's,* 654 S.W.2d at 876). The evidence at trial clearly established that the transactions on which Sanders failed to remit sales tax were based on the intrinsic value of the coins rather than on their representative value as currency. As evidenced by Sanders's trade confirmations, the price of each coin was based on its weight, not its face value as established by the issuing government. Thus in one instance a customer paid $8,020 for 20 Krugerrands because the coins were valued at $401 per ounce rather than at a value commensurate with any currency exchange rate between dollars and Krugerrands. *See Sanders*, 923 S.W.2d at 543.

Because the transactions at issue in this case involved the sale of coins and bullion based on their intrinsic, rather than [16] representative, values, the lower courts properly found the transactions taxable as sales of tangible personal property and properly distinguished the cases cited by Sanders. *See, e.g., Bronson v. Rhodes*, 74 U.S. (7 Wall) 229, 250 (1868) (holding that a *contract* designating payment in gold or silver coins, if paid in federal reserve notes, should be paid in an amount equal to the actual value of the gold or silver demanded in the contract and not merely a nominal amount); *Thompson v. Butler*, 95 U.S. 694, 696 (1878) (equating federal reserve note dollars with coin dollars as a medium of exchange). Because Sanders has failed to show that the state courts' decisions are "contrary to" Supreme Court precedent or otherwise involve an "unreasonable application of clearly established Federal law," the district court did not err in denying relief on this assignment of error. 28 U.S.C. § 2254(d); *see also Williams*, 120 S. Ct. at 1519.

Sufficiency of the Evidence

In *Jackson v. Virginia*, 443 U.S. 307 (1979), the Supreme Court stated that, in evaluating the sufficiency of evidence, a reviewing court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. Based on the evidence adduced at trial, and noting that the coins and bullion sold by Sanders were sold based on their intrinsic, rather than their representative, values, the state appellate courts did not err in finding the facts sufficient, as a matter of law, to allow a rational trier of fact to find Sanders guilty beyond a reasonable doubt. Contrary to Sanders's assertions, the "intrinsic-value" test[2] for taxable sales *is* simply a variant of the "investment-theory" test advanced by the state at trial. That a coin is sold for its intrinsic value rather than its face value generally indicates investment intent on the part of the buyer, and the lack of such intent, though perhaps admissible [17] as an affirmative defense, is not a reason for exempting from tax the sale of valuable coins and metals that will, in the vast majority of cases, never be used as currency.

Sanders argues on appeal that the Tennessee courts should not have affirmed his conviction on the basis that he sold coins for their value as precious metals rather than for their value as currency because the government at trial relied not on the "intrinsic value" theory adopted by the Tennessee appellate courts, but on what Sanders contends was insufficient evidence of his customers' "investment intent." Having reviewed the trial record, we conclude that investment intent was not an element of the crime for which Sanders was convicted. The government attributed investment intent to Sanders's customers because they purchased the coins for amounts far greater than that indicated by the coins' face value as currency. Because the intrinsic value of the coins sold far exceeded the coins' value as currency, the government referred to the purchase of coins with "investment intent" as a proxy for purchases based on a coin's intrinsic value. Thus we conclude that the government's alleged failure to produce sufficient evidence of investment intent at trial, even if proven, would not undermine the legitimacy of Sanders's conviction.

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[2] Under the "intrinsic value theory," the sale of a coin is taxable as a sale of personal property if the price of the coin is based on the value of the coin's precious metal content rather than on its face value as currency.

Sanders also attacks the "intrinsic value" test on its merits as an unprincipled and inappropriate means of determining whether a particular sale is taxable. The usefulness of the "intrinsic value" test as a means for distinguishing non-taxable currency-for-currency exchanges from taxable sales of coins-qua-tangible investment property is obvious. In this case, for example, the evidence presented at trial that Sanders's customers did not intend to use the coins and bullion they purchased as currency is bolstered by the fact that it would make little sense, in an economy where paper currency is freely accepted, to pay $5 cash for a gold coin with a face value of $1, and then use that coin to pay a debt or purchase services for which the buyer could have paid with paper (rather than the more valuable gold) currency.

[18] Sanders responds to this logic with a hypothetical in which the intrinsic value of a $1 silver coin is equal to its face value because the price of silver is low, and notes that in such a case the intrinsic-value theory would make taxable even an otherwise non-taxable currency-

for-currency exchange.[3] Whether it would be reasonable to treat such a transaction as a taxable sale by, for example, imputing an investment motive to the buyer is an interesting question, but beyond the scope of our inquiry in this case because the record clearly indicates that all of Sanders's transactions involved the exchange of paper currency for coins sold not according to their face values, but according to their weights as precious metals, which far exceeded their face values as currency. The transactions at issue here, like a transaction in which a customer pays $5 cash for a silver coin worth only $1 because the customer needs the coin to satisfy a contract specifying payment only in a specific silver coin, involved the sale of coins for their intrinsic, rather than face, values, and were therefore taxable under Tennessee law. The possibility that the price of a coin as determined by its precious metal content could equal its face value as currency is not only slight, it is irrelevant to our inquiry here because it does not render the Tennessee statute objectively ambiguous or otherwise absolve Sanders of his tax liability for the transactions on record in this case.

Although Sanders may be correct that a merchant cannot always tell whether his customers intend to use the coins they purchase as currency or not, any dealer who sells coins based on their intrinsic value rather than their face value is properly subject to sales tax under the statute. Sanders's hypotheticals notwithstanding, the evidence adduced at trial proves that the transactions that served as the basis for Sanders's conviction involved the purchase of gold and silver coins and bullion not for use as currency, but for investment or numismatic purposes, and as such were subject to state sales tax. *See e.g.*, [19] *Association of Ala. Prof'l Numismatists, Inc. v. Eagerton*, 455 So.2d 867 (Ala. Civ. App. 1984) (holding that a state sales tax on coins purchased for investment purposes did not impinge on Congress's authority to issue currency).

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[3] As demonstrated by the hypotheticals set forth in Sanders's briefs, even the most clearly written statute could not anticipate every situation that might arise between a buyer and seller of coins and precious metals.

With regard to Sanders's contention that the State did not sufficiently prove that the amount of sales tax he owed exceeded $5000, the following transactions involved the sale of coins and bullion as tangible personal property and served as the basis for Sanders's conviction and sentence:

Customer Name	Transaction Date	Subject of Trade	Amount Paid	Tax Rate	Alleged Tax Due
Batey	3/84	Silver Coin	$5,000.33	6.75%	$337.52
Batey	4/84	Krugerrands	$8,020	7.75%	$621.55
Batey	5/85	Silver Rounds	$510	7.75%	$39.53
Batey	8/84	Silver Bars	$2,430	7.75%	$188.33
Batey	12/84	Silver Bars	$2,322	7.75%	$179.96
Web	1/84	Gold Coin	$11,562.80	6.75%	$780.49
Web	7/84	Gold Coin	$7,904	7.75%	$612.56
Web	10/84	Gold Coin	$26,437.50	7.75%	$2,048.91
Thompson	1/85	Silver Bars	$12,000	7.75%	$930
Verhaeghe	11/84 -5/85	Krugerrands	$864,078.06	7.75%	$66,966.05
Smith	7/86	Silver Bars	$3,432	7.75%	$265.98
Smith	9/86	Silver Bars	$1,914	7.75%	$148.34
TOTALS			**$945,610.69**		**$73,119.22**

Sanders's "trade confirmations," or receipts, for each of the above transactions show that the coins and bullion sold were sold on the basis of each item's precious metal weight, rather than on the value of the item as currency. Because the sales were based on the items' intrinsic, rather than face, values, each transaction listed above was subject to sales tax, and the lower courts did not err in finding that the evidence presented at trial concerning the above transactions was sufficient to [20] support an order of restitution in an amount greater than the statutory minimum required for indictment.

Improper Testimony at Trial

Sanders contends on appeal that, because the jury could impermissibly impute his customers' investment intent to him, the trial court committed prejudicial error when it allowed his customers to testify that they did not intend to use the coins and bullion they purchased as currency. The Tennessee Rules of Evidence, which mirror the federal rules, provide in pertinent part that:

> All relevant evidence is admissible except as provided by the Constitution of the United States, the Constitution of Tennessee, these rules, or other rules of laws of general application in the courts of Tennessee.

See Tenn. R. Evid. 402. The rules define "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401.

In considering whether the customers' testimony was relevant and, if so, whether its admission violated state or federal law, the Tennessee Court of Criminal Appeals found: (1) that Sanders's "trade confirmations" were not contracts so the parol evidence rule did not preclude the customers from testifying; (2) that Sanders had the opportunity through the trade confirmations and his own testimony to establish his intent in conducting the sales at issue and that it was therefore not error to permit his customers to testify as to their intent in conducting the same transactions; and (3) based on a "thorough examination of the record" there was "no reason to suspect that the jury imputed the customers' intent to the defendant." JA 218-220.

The Tennessee Supreme Court affirmed the appellate court's findings, and Sanders has presented no evidence that the state courts "arrived at a conclusion opposite to that [21] reached by [the Supreme] Court on a question of law. . . . [or that they] confront[ed] facts that are materially indistinguishable from a relevant Supreme Court precedent and [nevertheless] arrive[d] at a result opposite to [the Court's]." *Williams*, 120 S. Ct. at 1519. Because there is no evidence that the Tennessee trial court abused its discretion in admitting the challenged testimony, or that the Tennessee Supreme Court's decision affirming Sanders's conviction was "contrary to, or involved an unreasonable application of, clearly established federal law," Sanders is not entitled to relief on this assignment of error. 28 U.S.C. § 2254(d)(1).

Improper Exclusion of Evidence

Sanders also asserts on appeal that the trial court committed prejudicial error when it refused to allow him to enter into evidence various legal materials supporting his "good faith" belief that his business transactions were not subject to state sales tax. Sanders contends that the trial court's refusal to admit this evidence prejudiced his case because a defendant's "subjective good faith belief, no matter how unreasonable, that he was not required to file a tax return," negates the defendant's culpability for tax evasion. *United States v. Powell,* 955 F.2d 1206, 1211 (9th Cir. 1991); *see also Cheek v. United States,* 498 U.S. 192 (1991) (noting that the government has the burden of proving that the taxpayer did not have a good faith belief or misunderstanding of the law).

Although Sanders relies on *Powell* and *Cheek* in an attempt to establish his right to a good faith defense, these cases are inapposite because they were decided not under Tennessee law, but under specific provisions of the federal Internal Revenue Code pertaining to income tax evasion. *See Cheek,* 498 U.S. at 201-02 (decided in accordance with 26 U.S.C. §§ 7201; 7203); *Powell,* 955 F.2d at 1211 (same). In addition, even if the Tennessee courts were to interpret their state revenue code in accordance with these cases, and even if the evidence of good faith that Sanders sought to present were relevant to his defense, there would be no due process violation, and thus no basis for habeas relief, because even [22] relevant evidence may constitutionally be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403; Tenn. R. Evid. 403. Acknowledging Sanders's reference to the Ninth Circuit's decision in *Powell*, the Tennessee Court of Criminal Appeals noted in affirming Sanders's conviction that *Powell* states only that a court "*ordinarily* cannot exclude evidence relevant to the jury's determination of what a defendant thought the law was." *Powell*, 955 F.2d at 1214 (emphasis added). In this case, the trial court made a reasoned determination that the probative value of the evidence was substantially outweighed by the possibility of misleading the jury. In affirming the trial court's decision to exclude, the Tennessee Court of Criminal Appeals noted:

> We agree with the trial court's finding that the danger was too great that the jury would improperly consider such evidence for its validity or soundness as law, and not for its reflection upon the defendant's state of mind. In considering the entire record in this case, we are satisfied that the jury gained a complete and accurate understanding of the defendant's state of mind from the defendant's own testimony and from the trade confirmations which were entered into evidence. Even if it was error for the trial court to exclude the materials upon which the defendant claims to have relief, it was harmless beyond a doubt. *See* T.R.A.P. 36(b); Tenn. R. Crim. P. 52(a).

When reviewing a state court's evidentiary determination pursuant to § 2254, a federal appellate court may not grant a petitioner's request for relief simply because it would have decided the evidentiary question differently than the state court. We may only grant relief if Sanders is able to show that the Tennessee trial court's evidentiary rulings were in conflict with a decision "reached by [the Supreme] Court on a question of law or if the state court [decided the evidentiary issue] differently than [the Supreme] Court [did] on a set of [23] materially indistinguishable facts." *Williams*, 120 S. Ct. at 1523.

The evidence Sanders wished to admit consisted of statutory definitions and 19th-century Supreme Court cases dealing with commerce in gold and silver currency that would confuse jurors more than it would assist them in determining whether he had a good faith belief that he was exempt from taxation. In addition, the state courts correctly noted that the evidence Sanders wished to admit would merely be supportive, if not duplicative, of the information in his trade confirmations and in his testimony at trial. Because Sanders has not shown that the trial court's decision to exclude his evidence is contrary to federal law, he is not entitled to relief on appeal. With regard to his argument that his testimony alone was insufficient to inform the jury of his intent, the decision to credit testimony that a defendant did not willfully or intentionally commit an illegal act is a question of fact for the jury that was resolved against Sanders in this case. *See State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978), *superseded in part by statute as stated in State v. Blanton*, 926 S.W.2d 953, 958 (Tenn. Crim. App. 1996). Because he has presented no evidence that would allow this court to find, as a matter of law, that no rational trier of fact could have found him guilty beyond a reasonable doubt, he cannot prevail on this assignment of error.

Erroneous Jury Instructions

Where a trial court's instruction "[is] a correct statement of Tennessee law, and it adequately cover[s] the subject matter contained in the special request . . . the trial judge commit[s] no error in declining to give the requested charge." *Shell v. State*, 584 S.W.2d 231, 235 (Tenn. Crim. App. 1977). In this case, Sanders requested that the jury be instructed that it could only convict if it found that he acted "feloniously" (i.e. "willfully") by committing a "voluntary, intentional violation of a known legal duty." The trial court denied Sanders's request, and opted instead to instruct the jury on the scienter element of the tax evasion charge by explaining the terms [24] "intentionally," "knowingly," and "by design." The trial court also instructed the jury that Sanders's failure to file tax returns did not prove either his intent to evade taxation or his guilt on either of the charges listed in the indictment.

In *Estelle v. McGuire*, 502 U.S. 67 (1991), the Supreme Court held that jury instructions involving alleged state law error may not serve as the basis for habeas relief unless they have "so infused the trial with unfairness as to deny due process of law." *Id.* at 75. Although Sanders contends on appeal that the jury instructions were inadequate, he presents no evidence that the jury instructions did not adequately inform the jury of the level of *mens rea* necessary for conviction. Because Sanders has not met his burden of showing that the trial court's instructions on intent "so infused the trial with unfairness as to deny due process of law," the trial court's decision not to instruct the jury as Sanders requested is not contrary to federal law and he is not entitled to relief on appeal.

Propriety of the Order Directing Petitioner to Pay $73,000 in Restitution

In his final assignment of error, Sanders contends that, under Sixth Circuit law, the restitution order issued by the trial court "lacks a rational basis" in evidence and is excessive because it covers more than the "loss actually suffered" by the state. *United States v. Daniel,* 956 F.2d 540, 543 (6th Cir. 1992). Sanders's objections on this issue lack merit. As the Tennessee Court of Criminal Appeals noted in considering this issue de novo, the evidence presented at trial concerning Sanders's transactions clearly supports the trial court's order requiring him to pay restitution of approximately $73,000. The court correctly stated that "[t]he defendant disputed the taxability of [the] transactions [discussed at trial], but he did not dispute the amount of money involved in each of the exchanges."

Section 40-35-304(a) of the Tennessee Code specifically authorizes the sentencing court to impose restitution as a condition of probation. If the sentencing court orders [25] restitution, T.C.A. § 40-35-304(b) requires the court to request that documentation regarding the nature and amount of the victim's pecuniary loss be included in the presentence report. Although this information was not included in Sanders's presentence report, the Tennessee Court of Criminal Appeals properly concluded that the lack of documentation did not harm Sanders because the trial court held a sentencing hearing "to give [him] full consideration under the law regarding restitution." *State v. Moore,* 814 S.W.2d 381, 384 (Tenn. Crim. App. 1991).

Because Sanders does not dispute the amount of money at issue in each of the transactions documented in the record, and because we find as a matter of law that each of these transactions was taxable, we conclude that there was no constitutional error in the holding of the Tennessee courts that the evidence at trial supports restitution in the amount of $73,000. *See* T.C.A. § 40-35-401(d); *State v. Brown*, 832 S.W.2d 594, 595 (Tenn. Crim. App. 1992). *Cf. Daniel*, 956 F.2d at 543 (holding that, under Sixth Circuit law and certain enumerated provisions of the federal Internal Revenue Code, restitution in income tax evasion cases should be based solely on the amount of tax liability for which the defendant was convicted). Sanders points to no evidence or case law suggesting that the Tennessee courts erred in finding that the evidence at trial supported the amount of restitution ordered, or that his tax liability was calculated in a manner contrary to established federal law. As a result, he is not entitled to relief on this issue.

III

Because Sanders has failed to satisfy the requirements for habeas corpus relief under 28 U.S.C. § 2254, we **AFFIRM** the district court's final judgment denying reconsideration and granting summary judgment for the state.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 98-6512

FRANKLIN SANDERS,

Petitioner,

v.

WILLIAM E. FREEMAN, JR. and CHARLES BURSON,

Respondents.

Before: BOGGS and COLE, Circuit Judges; and ZATKOFF, District Judge.

JUDGMENT

(Filed Jul. 19, 2000)

On Appeal from the United States District Court
for the Western District of Tennessee at Memphis.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

**ENTERED BY ORDER
OF THE COURT**

/s/ Leonard Green
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FRANKLIN SANDERS

Plaintiff,

VS. Civil No. 96-2698-G

STATE OF TENNESSEE,

Respondent.

JUDGMENT IN CIVIL CASE

(Filed Nov. 24, 1997)

Decision by Court. This action came for consideration before the Court. The issues have been duly considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the provisions as set forth in the Order Granting Respondent's Motion for Summary Judgment, entered November 19, 1997, all of petitioner's claims are without merit. Respondent's motion for summary judgment is GRANTED in its entirety.

/s/ Julia Smith Gibbons
JULIA SMITH GIBBONS
UNITED STATES DISTRICT JUDGE

November 25, 1997
Date

ROBERT R. DI TROLIO
Clerk

/s/ Betty A. Guy
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FRANKLIN SANDERS

Plaintiff,

VS. No. 96-2698-G

STATE OF TENNESSEE,

Respondent.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

(Filed Nov. 19, 1997)

Before the court are cross motions for summary judgment on the petition for writ of habeas corpus filed by Franklin Sanders. Respondent State of Tennessee ("State") filed its motion for summary judgment on February 13, 1997. Petitioner responded with his cross-motion for summary judgment on March 14, 1997. For the following reasons, respondent's motion for summary judgment is granted.

Petitioner is a dealer in gold and silver bullions and coins and precious metals. On September 18, 1989, petitioner was indicted on one count of depriving the State of Tennessee of realization of lawful revenue in connection with petitioner's sale of gold and silver coins and bullion and South African Krugerrands and one count of delaying the collection of revenue exceeding the amount of

$5,000 for the sale of the same, both counts in violation of T.C.A. § 67-1-1440(d).[1] Petitioner was [2] convicted by a jury on both counts. Although petitioner received concurrent sentences of one year on each count, the trial court suspended all but thirty days of the sentence, which petitioner has since served. Additionally, the trial court imposed six years probation and ordered that petitioner pay $73,000 in restitution and complete 1000 hours of community service.

On August 10, 1994, the Tennessee Court of Criminal Appeals ("intermediate appellate court") affirmed petitioner's conviction with regard to count two of the indictment. The intermediate appellate court, however, reversed and dismissed petitioner's conviction on count one, concluding that the State "impermissibly used the exact same course of conduct to convict the defendant of two violations of the same statute" in violation of petitioner's right against double jeopardy as provided by the Sixth Amendment to the United States Constitution. 1994 WL 413465, at *10 (Tenn. Crim. App. Aug. 10, 1994). On May 28, 1996, the Tennessee Supreme Court affirmed the decision of the intermediate appellate court. Specifically, the court focused on the issue of whether petitioner's sale of gold and silver coins and bullion and Krugerrands were subject to sales tax imposed by T.C.A. § 67-1-101 *et seq*. The Supreme Court concluded that the taxation of the items was proper.

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[1] T.C.A. § 67-1-1440(d) states in pertinent part:

> It is a Class E felony for any person to delay, hamper, hinder, impede, obstruct, or thwart the state of Tennessee in the collection [2] of any of its lawful revenue, or to deprive the state of the realizatiod of that revenue at the time it is lawfully entitled thereto by any . . . stratagem, or by the falsification of any record, report, or return required by law. Each act done in violation of the act is a separate offense.

On July 8, 1996, petitioner filed the instant petition for federal habeas relief under 28 U.S.C. § 2254. Petitioner [3] raises seven grounds for relief. First, petitioner argues that the State's criminal prosecution of him pursuant to T.C.A. § 67-1-1440(d) violated his rights to due process under the United States Constitution and the Tennessee Constitution. Second, petitioner asserts that his conviction violates the United States Constitution and state and federal laws because the sale of gold and silver coins and bullion and Krugerrands may not be taxed by the state as tangible personal property. Third, petitioner asserts that the State did not produce evidence sufficient to prove beyond a reasonable doubt the amount of sales tax petitioner allegedly delayed in paying to the State in violation of T.C.A. § 67-1-1440(d). Fourth, petitioner contends that the trial court permitted the State to submit evidence in a manner that violated his constitutional rights, in order to prove petitioner's criminal intent. Fifth, petitioner argues that the trial court erroneously refused to admit evidence on which he relied in good faith when not paying his taxes. Sixth, petitioner asserts that the trial court's decision to omit instructions regarding the "willfulness" element of the felonious conduct charge in the jury instructions violated his due process rights. Seventh, petitioner contends that the amount of restitution which he was ordered to pay was not based upon a rational finding of the jury. After reviewing the standards applied in § 2254 cases, the court will consider each of petitioner's allegations in turn.

Section 2254 creates a habeas remedy in federal court for relief from state conviction. Under § 2254, a petitioner may [4] seek relief in federal court if he "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). As previously stated, petitioner has served the ordered period of incarceration. A habeas petition does not, however, become moot upon release from incarceration provided that petitioner has a substantial interest in the judgment or conviction that survives the incarceration or there are collateral consequences sufficient to keep the habeas petition alive. *Carafas v. Lavallee*, 391 U.S. 234, 237 (1968); *DePompei v. Ohio Adult Parole Auth.*, 999 F.2d 138, 140 (6th Cir. 1993).[2] Additionally, federal habeas relief may only be sought upon a showing that a petitioner has exhausted his available state remedies, 28 U.S.C. § 2254(b), and such remedies shall be deemed exhausted where the petitioner no longer has the right to raise, by any available procedure, the question presented, 28 U.S.C. § 2254(c). *See generally Rose v. Lundy*, 455 U.S. 509 (1982).

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[2] In this court's order denying petitioner's motion to release, it was determined that:

> Petitioner in this case was sentenced to 30 days *imprisonment plus* 1,000 hours community service, $73,000 restitution, and six months probation. Moreover, the underlying conviction and its interpretation of state law may affect petitioner's ability to practice his profession. Therefore, it is clear that petitioner's petition [is] not . . . moot even . . . [though he has] complet[ed] . . . his imprisonment.

Sanders v. State, No. 96-2698 (W.D. Tenn. July 11, 1996)

In federal habeas proceedings instituted under § 2254, "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . shall be presumed to be correct," unless the petitioner establishes certain enumerated circumstances. 28 U.S.C. § 2254(d); *Marshall* [5] *v. Lonberger*, 459 U.S.C. 422, 431-432 (1983). Additionally, 28 U.S.C. § 2254(d), as amended, limits the court's review of issues of law decided by the state court to those in which there has been a decision based on the "unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States" or an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2245(d)(1)(2). The federal court, in determining the legal issues raised in a motion under § 2254, however, is to apply federal law, the primary goal being to ensure that state criminal processes satisfy federal constitutional standards. *See id.* at 431.

In considering a petition brought under § 2254, a court is bound to consider the submissions presented by the parties and determine if there is a question of fact that would require an evidentiary hearing. *See* Rules Governing Section 2254 Cases in United States District Courts ("§ 2254 Rules"), Rule 8. Yet, under § 2254(e)(2), as amended, this court is not to hold an evidentiary hearing on any claim unless petitioner demonstrates that such claim relies on the following:

> (A)(1) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (2) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). Respondent argues that as no material [6] questions of fact are presented, no evidentiary hearing is required and, therefore, respondent is entitled to summary judgment under Federal Rule of Civil Procedure 56.[3] According to Rule 11 of the § 2254 Rules,

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[3] Summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party convincingly establishing the nonexistence of any genuine issue of material fact, and the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1133 (6th Cir. 1986).

When confronted with a properly support motion for summary judgment, the non-moving party must set forth specific facts showing that there is a genuine issue for trial. A genuine issue for trial exists if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party the Federal Rules of Civil Procedure may be applied, when appropriate, to the extent they are not inconsistent with the § 2254 Rules. Under Rule 8 of the § 2254 Rules, if the court determines that no evidentiary hearing is required, the court "shall make such disposition of the petition as justice requires." As each of petitioner's claims was fully adjudicated on the merits in state court proceedings, the claims are exhausted and ripe for consideration by this court. Therefore, the court addresses each of petitioner's contentions in accordance with the § 2254 Rules previously stated.

1. **Insufficient Notice.** Petitioner alleges that he was subjected to criminal prosecution without notice, which violated [7] his rights to due process as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, § 8 of the Constitution of Tennessee. Specifically, petitioner asserts that the sales tax laws applicable to the purchase and sale of gold and silver coins and bullion and Krugerrands were "objectively ambiguous . . . so that it fails to provide fair notice as a matter of law." *United States v. Harris*, 942 F.2d 1125, 1132 (7th Cir. 1991). Petitioner argues that the lack of fair warning regarding his obligation to pay the state sales

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opposing the motion must "do more than simply show that there is some meta-physical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In short, the non-moving party may not oppose a properly supported summary judgment motion by mere reliance on the pleadings. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Instead, then-moving party must present "concrete evidence supporting its claims." *Cloverdale Equip. v. Simon Aerials, Inc.*, 869 F.2d 934, 937 (6th Cir. 1989).

tax, therefore, raises grounds for reversal of his conviction.

Petitioner relies heavily on the decision of the United States Court of Appeals for the Fourth Circuit in *United States v. Mallas*, 762 F.2d 361 (4th Cir. 1985), and related cases in which defendants were found to have lacked adequate notice regarding the application of ambiguous or unsettled tax law. *See United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974) (finding that where defendant had been informed by a government agency that she would not be subject to taxation for specified rental income under a vague tax law, defendant could not be found to possess the necessary intent to violate such law). In *Mallas*, the court found that the conviction of defendants for their design of complex tax shelter programs could not stand as it was premised on the application of a point of law, which at the time was still "vague or highly debatable" *Critzer*, 498 F.2d at 1162. That court stated that "where the law is vague or highly debatable, a defendant – actually or imputedly – lacks the requisite intent to violate it." *Mallas*, 762 F.2d at [8] 363 (citations omitted).

Petitioner argues that he stands in the same position as the *Mallas* defendants. Petitioner claims that the State failed to provide notice in the form of a judicial decision or regulation or revenue ruling informing him that the sale of gold and silver coins and bullion and Krugerrands would be subject to Tennessee sales tax. Therefore, petitioner asserts that as his interpretation of the Tennessee sales tax requirements presents a "non-frivolous" theory of an ambiguous tax provision, he cannot be convicted of a crime for which he had no fair notice.

In *Mallas* and related cases, however, the reviewing courts found that tax laws at issue were legitimately subject to contrary interpretations that were reasonable and well-supported. *Mallas,* 762 F.2d at 364. On review, in this case, the Court of Criminal Appeals found that the Tennessee sales tax provision lacked the legitimate ambiguity claimed in *Mallas* and related cases. The Tennessee Supreme Court re-examined petitioner's assertion of lack of notice at length before adopting the intermediate appellate court's finding. The Supreme Court, adopting the determination of the intermediate appellate court, reasoned:

> In fact, the relevant provisions of Tennessee's Code are rather clear in their applicability to the defendant's transactions . . . The plain meaning of these statutory provisions is not, as the defendant contends, so vague and ambiguous as to lead one to believe that the sale of gold and silver coins and bullion is not subject to sales tax.
>
> Even the *Mallas* court conceded that "a duty not articulated by regulatory language or judicial construction may nonetheless be compelled by the authoritative force of common sense." *Mallas,* 762 F.2d at 364. Furthermore, the *Mallas* court also recognized that "due process does not require the prosecution to cite a litigated fact pattern directly on point." *Id.* (citing *United States v.* [9] *Ingredient Technology Corp.,* 698 F. 2d 88, 96 (2d Cir. 1983)). In the *Ingredient Technology Corp.* case, the Second Circuit held the following: All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is

> forbidden, and thus not lull the potential defendant into a false sense of security, giving him *no reason even to suspect that his conduct might be within its scope. Id.* (emphasis added). From a thorough review of the record in this case and the statutory provisions in question, we simply cannot conclude that the defendant's tax obligation is ambiguous as a matter of law. This claim is therefore without merit.

State v. Sanders, 923 S.W.2d 540, 544 (Tenn. 1996) (citations omitted). Petitioner has not provided this court with evidence sufficient to prove otherwise.

Although the traditional forms of notice may not have been provided to petitioner, according to the intermediate appellate court and Supreme Court, such notice was not necessary under the circumstances. Petitioner has not submitted clear and convincing evidence to overcome the presumption in favor of the trial court's finding. Additionally, petitioner has not demonstrated that the final decision resulting from the state court proceedings resulted in an unreasonable application of law or an unreasonable determination based upon the record. Accordingly, this court finds that petitioner's insufficient notice claim does not raise grounds for habeas review. Respondent's motion for summary judgment on this claim, therefore, is GRANTED.

2. Prosecution under Unconstitutional Application of Law.

Petitioner's second ground for habeas relief is that his prosecution and subsequent conviction was based upon an unconstitutional application of law. Petitioner theorizes that the sale of gold and silver coins and bullions and Krugerrands is [10] a non-taxable exchange of money for money, rather than an exchange of money for tangible personal property subject to taxation pursuant to T.C.A. § 67-1-101 *et seq*. Petitioner further contends that the imposition of the Tennessee sales tax on the exchange of Federal Reserve Notes for coins and bullion interferes with Congress's power to coin money under Article 1, § 10 of the United States Constitution. Petitioner, therefore, asserts that as his actions were improperly taxed by the State, his conviction under T.C.A. § 67-7-1440(d) for failure to pay the sales tax should be overturned.

Both the intermediate appellate court and Tennessee Supreme Court considered petitioner's claim at length. After analyzing each of the relevant sales tax provisions and pertinent evidence, the Supreme Court affirmed the intermediate appellate court by concluding that coins and bullion were subject to taxation. The court found that:

> The evidence in this case establishes the State's position that the transactions on which the defendant failed to collect and remit sales tax were based on the intrinsic value of the precious metals rather than their representative value as a medium of exchange. The most compelling evidence in the "trade confirmations" delivered by the defendant to his customers, which show that the value of each coin was based on its weight, not its value as established by the issuing government. For example, the record shows that one customer paid $8,020.00 for 20 Krugerrands valued at $401.00 per ounce rather than valued according to an exchange rate between dollars and Krugerrands.

923 S.W.2d at 543. In drawing this conclusion of law, the Supreme Court referred to at least six other jurisdictions that have determined that gold and silver bullion and coins are tangible personal property. *Id.* Additionally, using the same reasoning as the Missouri Supreme Court in *Scotchman's Coin Shop,* [11] *Inc. v. Administrative Hearing Comm.,* 654 S.W.2d 873 (Mo. 1983), the Supreme Court determined that Tennessee's taxation of the sale of coins did not interfere with the right of the federal government to "coin money" pursuant to Article 1, § 10 of the United States Constitution. *Sanders,* 923 S.W.2d at 543.

Nonetheless, petitioner urges this court to find the state courts'[4] conclusions are unreasonable based on state and federal legal precedent. Petitioner has presented a host of cases to support his claim. These cases, however, pose contrary conclusions of law based on minor differences in the relevant state's tax law or address antiquated legal issues providing little support to his claim. *See Smith v. Florida Dept of Revenue* (holding that South African Krugerrand are not subject to taxation as they fall within Florida's statutory definition of intangible personal property); *Bronson v. Rhodes,* 74 U.S. (7 Wall) 229, 250 (1869) (declaring that a contract payable in gold or silver coins if paid in Federal Reserve Notes was to be paid in an amount equal to the actual value of the gold or silver, not merely a nominal amount); *Thompson v. Butler,* 95 U.S. 694, 696 (1878) (equating FRN dollars with coin dollars as a medium of exchange).

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[4] "State courts" refers to the trial, appellate, and Supreme Courts.

This court finds that petitioner has not presented any evidence to show that the adjudication of his claim on the merits in the state court proceedings resulted in a decision that was unreasonable in light of the evidence presented at trial or that [12] the holding was an unreasonable application of federal law, as determined by the United States Supreme Court. As petitioner's claim is without substance it does not survive respondent's motion for summary judgment, nor does it provide a basis for habeas review. Thus, summary judgment as to petitioner's second allegation is GRANTED.

3. **Insufficiency of the Evidence.** Petitioner alleges that the evidence presented at trial was insufficient to convict him for violation of T.C.A. § 67-7-1440(d). This third claim incorporates two related allegations. The resolution of the first claim, however, will resolve the second. First, petitioner argues that the State's evidence regarding the amount of sales tax due on petitioner's sale of gold and silver coins and bullion and Krugerrands was insufficient to sustain his conviction. Second, petitioner asserts that the State did not sufficiently prove the "intrinsic-value" theory of valuation which it used to calculate the amount of sales tax owed by petitioner.

As to the first allegation, petitioner claims that the State failed to prove that the sales tax owed by petitioner for revenue on the sale of gold and silver coins and bullion and Krugerrands exceeded $5,000 as alleged in the indictment. Specifically, petitioner objects to the intermediate appellate court's determination that:

> Although the defendant's assertion that these sales [made to customers for "investment" purposes] do not render a sales tax in excess of five

> thousand dollars ($5,000) is correct, the defendant erroneously assumes that these sales are the only taxable transactions. In fact, while considering the defendant's second issue on appeal, we found that all of the transactions which are [13] involved in this case are subject to sales tax, not just the ones involving bullion and coins admittedly acquired for "investment purposes."

1994 WL 413465, at *7. This finding was based on that court's application of the "intrinsic-value" test to the sales at issue rather than the more limited "investment theory"[5] test as expressed by the State. Petitioner argues that because the "intrinsic-value" test was first asserted by the court, not the State, this test may not be applied to determine the amount of sales tax owed by petitioner. After reviewing the state court decisions under the habeas standard, however, this court finds petitioner's claims to be without foundation.

In *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), the United States Supreme Court articulated the rule that in reviewing an insufficiency of evidence argument the court determines, "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* As the state standard of review for insufficiency of evidence mirrors the federal rule, the [14] intermediate appellate court applied the above-stated standard in its review of the trial court decision. 1994 WL 413465, at *5, *7 (citing *State v. Tuggle,* 639 S.W.2d 913, 914 (Tenn. 1982)). On review, the intermediate appellate court determined that petitioner failed to meet his burden of persuasion.

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[5] The "investment theory" as articulated by the office of the Attorney General for the State of Tennessee requires:

> Gold and silver bullion and coins sold for the purposes of, collection and/or investment constitute taxable transactions under the Tennessee Sales Tax Act. This position is consistent with that in other states an in accord with the holding in *Losana Corp. v. Porterfield*, 236 N.E.2d 535 (1968) . . . [where] it was held that sales taxes were properly owing on rare United States coins withdrawn from circulation as currency and privately sold at prices substantially above their extrinsic or par value.

Tenn. Op. Att'y Gen., No. 810476, 1981 WL 169424, at *1-2 (Tenn. A.G. Aug. 26, 1981).

The valuation method to be applied in this case was a mixed question of law and fact to be determined by the court. The court was to determine the appropriate method by which to value the sale of objects for taxation purposes and which sales were properly made subject to the sales tax in petitioner's particular case. In resolving this issue, the intermediate appellate court determined that the coins and bullions sold by petitioner were to be valued based on their precious metal content or "intrinsic value" regardless of the purchaser's intent. *Id.* at *6 (citing *Scotchman,* 654 S.W.2d at 875). The court analyzed the relevant case law and the record submitted from the trial court. After applying the "intrinsic value" theory of valuation, the intermediate appellate court determined that each of the transactions at issue was appropriately taxed under Tennessee law. *Id.* at *7. The intermediate appellate court chose to eliminate the element of customer intent, as prescribed in the valuation method articulated by the State in the trial court proceedings which effectively broadened the range of transactions covered under the

State's theory. The State's valuation method, however, remained otherwise untouched. Thus, after reviewing the record under the appropriate standard of [15] review, the intermediate appellate court determined that the "facts are sufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of delaying and depriving the state in the collection and realization of sales tax revenue in excess of $5,000." 1994 WL 413465, at *7.

When analyzed under § 2254 (d) standard of review, petitioner's allegations fail. Petitioner has not provided evidence to override the presumption that the conclusions drawn initially by the trial court record were correct. To the contrary, given the state courts' thorough review of the record and exploration of the complex legal issues surrounding the application of Tennessee sales tax to the transactions at issue, the decision of the state courts appears to be appropriate and reasonable. As the intermediate appellate court's and Supreme Court's adoption of the "intrinsic value" method of valuation to calculate the amount of sales tax owed by petitioner was appropriate, and the record clearly indicates that under this valuation method petitioner owed taxes in excess of $5,000, petitioner's claim for insufficiency of evidence fails. Thus, as petitioner's claims are without merit, respondent's motion for summary judgment as to this ground is GRANTED.

4. Improper Use of Evidence. Petitioner claims that the trial court allowed improper witness testimony in order to prove that petitioner possessed the necessary criminal intent of "willfulness." The State produced three of petitioner's [16] customers at trial who testified as to their intent when purchasing gold and silver coins or bullions and Krugerrands. Each of these customers had been presented with a trade confirmation upon making their purchase from petitioner. Although the trade confirmations indicated that the customers and petitioner were engaging in the exchange of Federal Reserve Notes for gold and silver coins and bullion and Krugerrands, which is supposedly a non-taxable transaction, the customers testified that they had actually intended to use the Federal Reserve Notes to purchase the above-listed items as tangible personal property, which is a taxable transaction. Petitioner asserts that the customers never spoke with him to learn of his intent in providing the customers with trade confirmation statements. Therefore, he contends that the customers could only infer petitioner's intention, which is insufficient proof of petitioner's actual intent with regard to the transactions. Petitioner, therefore, claims that the jury convicted petitioner based on the customers' intent, rather than his intentions.

Upon review of the trial court record, the intermediate appellate court concluded, "it appears that the jury considered the defendant's testimony and the trade confirmations as an expression of the defendant's intent, and the customer's testimony as an expression of their own personal intent." 1994 WL 413465, at *8. The court further determined, "there is nothing in the record which suggests that the jury considered the customers' testimony in bearing on the sincerity of the [17] defendant's stated belief that the transactions at issue were not taxable." *Id.* Moreover, the intermediate appellate court determined that even if the admission of the customers' testimony was an error, it was harmless error pursuant to the Tennessee Rules of Appellate Procedure ("T.R.A.P.") 36(b) and Tenn. R. Crim. P. 52(a). *Id.*

Petitioner has not given this court any reason to find the decision formed in the state court proceedings concerning the admission of customer testimony was unreasonable in light of the evidence presented at trial or that it contradicts federal law as determined by the Supreme Court. The intermediate appellate court and Supreme Court, like this court, review the record with a presumption in favor of the determination made by the trial court. Petitioner's burden in presenting a claim for habeas review is enormous and petitioner has failed to meet that burden. Thus, respondent's motion for summary judgment as to petitioner's fourth claim is GRANTED.

5. Improper Exclusion of Evidence. Petitioner argues that the trial court erroneously refused to admit the legal material upon which he relied in good faith when forming his misunderstanding of the laws at issue in the present matter. Petitioner contends that the admission of this evidence would show that he lacked the criminal intent necessary for conviction under T.C.A. § 67-1-1440(d). The trial court determined that the admission of these materials, however, would potentially confuse and mislead the jury. *Id.* at *8. Petitioner suggests that the [18] trial court's concern over the jury's improper consideration of petitioner's evidence is unfounded.

Petitioner refers to the United States Court of Appeals for the Sixth Circuit decision in *United States v. Curtis,* 782 F.2d 593, 598 (6th Cir. 1986), to support his contention that a defendant may present evidence to show confusion or reliance which formed a misunderstanding of law. *See United States v. Garber*, 607 F.2d 92, 97-98 (5th Cir. 1979) (holding that the novel or uncertain state of law is relevant as evidence of defendant's state of mind). *But see Curtis*, 782 F.2d at 598 (rejecting *Garber* to the extent that it "allows juries to find that uncertainty in the law negates willfulness even when the defendant is unaware of that uncertainty."). While petitioner's point is well taken, it is long-established that relevant evidence will not be admitted "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403; Tenn. R. Evid. 403.

The intermediate appellate court on review of this issue found that the record supported the trial court's decision to exclude the evidence which petitioner sought to have admitted. The court agreed that "the danger was too great that the jury would improperly consider such evidence for its validity or soundness as law, and not for its reflection upon the defendant's state of mind." 1994 WL 413465, at *8. Additionally, it concluded that the petitioner's own testimony as to his state of [19] mind in addition to the trade confirmations which were submitted into evidence, provided a "complete and accurate understanding" of petitioner's state of mind. *Id.* The intermediate appellate court observed that even if the trial court's decision was erroneous, the error would be harmless as provided by T.R.A.P. 36(b) and Tenn. R. Crim. P. 52(a). *Id.*

While petitioner argues that his defense was affected by his inability to submit the legal materials upon which he allegedly relied, petitioner does not provide compelling evidence that the trial court was unreasonable in choosing to exclude the evidence after weighing its probative value against its prejudicial impact. Therefore, presuming that trial court's determination to be correct, there is nothing on the record before this court to suggest that the state court's decision was unreasonable. Accordingly, respondent's motion for summary judgment is GRANTED.

6. **Improper Jury Instructions.** Petitioner asserts that the trial court's decision to omit from the jury instructions the requirement for a finding of "willfulness" in order to convict petitioner of felonious conduct, constituted plain error and denied him due process of law. Petitioner claims that the trial court did not use the term "willful" or explain that in order to find petitioner guilty there must be a finding that petitioner committed "a voluntary, intentional violation of a known legal duty." *United States v. Pomponio,* 429 U.S. 10, 12 (1976) (defining the element of "willfulness" under section 7206 [20] of the Internal Revenue Code). Petitioner asserts that the trial court opted to permit the jury to find petitioner guilty if he "simply knew what he was doing and intended to act regardless of good faith misunderstanding of law." (Am. Pet. for Writ at 83). Petitioner argues that the defense of "good faith" is valid under T.C.A. § 67-1-1440(d), as it negates the element of "willful" intent. Therefore, he asserts that the court denied him due process of law in failing to explain that a good faith misunderstanding necessarily bars a guilty verdict.

The trial court's decision to deny petitioner's request to instruct the jury on "willfulness" does not provide a basis for habeas review in the present matter. In *Estelle v. McGuire,* 502 U.S. 67, 75 (1991), the United States

Supreme Court determined that jury instructions involving state law error may not provide the basis for habeas review unless they have, "so infused the trial with unfairness as to deny due process of law." *Id.* (quoting *Lisenba v. CA*, 314 U.S. 219, 228 (1941)). On review, the intermediate appellate court reported that the trial court chose to instruct the jury on "intentionally," "knowingly," and "by design." Additionally, the trial court "instructed the jury that the mere failure of the defendant to file tax returns does not prove the crime charged." 1994 WL 413465, at *9. Based on the record, the intermediate appellate court concluded that "where a court's instructions was a correct statement of Tennessee law, and it adequately covered the subject matter contained in the special request . . . the trial judge committed no [21] error in declining to give the requested charge." *Id.* (quoting *Shell v. State*, 584 S.W.2d 231, 235 (Tenn. Crim. App. 1977)). Although the intermediate appellate court conceded that the instruction as to "willfulness" may have been preferable, it clearly did not find that the trial court had erred in its decision. *Id.* Additionally, the trial court's inclusion of elements of "willfulness" as defined in federal case law in the jury instructions further supports the decision of the trial court as affirmed by the intermediate appellate court and Supreme Court. Thus, the jury instructions are satisfactory under both the applicable state and federal standards.

Again, the evidence and arguments provided by petitioner fail to overcome the presumption in favor of the trial court's choice of jury instructions. As petitioner's claim does not raise issues of material fact or grounds for habeas review, respondent's motion for summary judgment as to petitioner's sixth claim is GRANTED.

7. **Amount of Restitution is Improper.** Petitioner contends that the amount of ordered restitution was not based upon a rational finding of the jury. Petitioner asserts that no proof was offered at trial to support the established restitution amount. Specifically, petitioner argues that there was no posttrial proof or other proof that the jury convicted petitioner due to his actions in each of the sales transactions at issue. Petitioner refers to *United States v. Daniels*, 956 F.2d 540, 543 (6th Cir. 1992) for the proposition that restitution is limited [22] to the amount of actual loss. In this case, petitioner claims that actual loss is at most $5,000. This allegation fails for two reasons.

First, this court is not bound to the holding of *Daniels*, which was decided by the United States Court of Appeals for the Sixth Circuit. Under federal habeas guidelines this court is only to review state court decisions in light of the unreasonable application of federal law as determined by the United States Supreme Court. Second, although petitioner has referred to *Daniels* to support his position, a thorough reading of the case actually weakens his argument. *Daniels* held that the appropriate amount of restitution to be ordered against a defendant in an income tax evasion case was to be based solely on the amount of tax liability for which defendant was convicted. 956 F.2d at 543-44. In the present matter, the intermediate appellate court, in its *de novo* review of petitioner's restitution claim,[6] explained:

> The State presented evidence concerning several transactions between the defendant and five customers. The defendant disputed the taxability of these transactions, but he did not dispute the amount of money involved in each of the exchanges. In addressing defendant's second issue on appeal, we concluded that all of the transactions at issue in this case are properly subject to sales [23] tax. Given this finding, we can only conclude that the evidence in the record fully supports the trial court's imposition of $73,000 in restitution.

1994 WL 413465, at *11. Because the state courts in this case found all of petitioner's transactions were the proper subject of the State's criminal tax liability case, they appropriately used this liability as the basis for computation of the restitution to be paid by petitioner. This finding is consistent with the rule articulated by the Sixth Circuit in *Daniels*.

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[6] The Court of Criminal Appeals conducted a *de novo* review of the amount that petitioner was ordered to pay as a condition to his probation and the method by which that amount was computed. Both issues were analyzed pursuant to T.C.A. § 40-35-401(d). T.C.A. § 40-35-401(d) provides:

> When reviewing sentencing issues raised pursuant to subsection (a), including the granting or denial of probation and the length of sentence, the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken is correct.

Petitioner has not presented this court with clear and convincing evidence to overcome the presumption of correctness on the trial court or the intermediate appellate court decisions, nor has he raised any grounds for habeas review. Thus, as petitioner's claim is without merit, respondent's motion for summary judgment as to petitioner's seventh claim, therefore, is GRANTED.

Conclusion. According to Rule 8 of the § 2254 Rules, and under the appropriate standards of summary judgment, this court determines that all of petitioner's claims are without merit. Accordingly, respondent's motion for summary judgment is GRANTED in its entirety.

IT IS SO ORDERED.

/s/ Julia Smith Gibbons
JULIA SMITH GIBBONS
UNITED STATES DISTRICT JUDGE

November 18, 1997
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FRANKLIN SANDERS,

Petitioner,

VS. No. 96-2698-G

WILLIAM E. FREEMAN, DIRECTOR
SHELBY COUNTY CORRECTIONAL CENTER

Respondent.

ORDER DENYING MOTION TO DISMISS
AND GRANTING MOTION TO ADD PROPER PARTIES
(Filed November 15, 1996)

Before the court is respondent William Freeman's motion to dismiss or alternatively to add the proper parties. For the following reasons, respondent's motion to dismiss is denied and the motion to add proper parties is granted.

A review of the complete factual history of this matter is not necessary. The pertinent factual information for purposes of determining the merits of this motion begins when petitioner was taken into custody. On June 28, 1996, petitioner was taken into the custody of the Shelby County Sheriff and placed in the Shelby County Jail. He was transferred to the Shelby County Correction Center ("SCCC") on July 5, 1996 to serve the balance of his sentence. On July 23, 1996, petitioner was released from confinement and is currently on probation for six years.

On July 8, 1996, petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 alleging that he was [2] in the custody of the SCCC and naming William Freeman, Director of the Shelby County Division of Correction, as respondent. On July 25, 1996, petitioner filed an amended petition for writ of habeas corpus retaining William Freeman as respondent. Respondent Freeman argues, however, that he is not the proper respondent to the petitions because he did not have "custody" of the petitioner at the filing of the amended complaint.

Rule 2(a) governing § 2254 provides that the petition for writ of habeas corpus must name the state officer who has custody of the applicant. Normally, the proper person to be served is the warden of the institution where the petitioner is confined or the chief officer in charge of state penal institutions. *See* 28 U.S.C. § 2254 Advisory Committee's Note. Because petitioner is on probation, the persons who have custody over him are of a different variety.

The Advisory Committee Notes to Rule 2(b) of § 2254 provide guidance. Recognizing that "custody" encompasses more than just imprisonment, the Committee suggests the types of respondents who should be named in certain situations. Situation two provides as follows:

> (2) The applicant is on probation or parole due to the state judgment he is attacking. The named respondents shall be the particular probation or parole officer responsible for supervising the application, and the official in charge of the parole or probation agency, or the state correctional agency, as appropriate.
>
> . . . .

> In any of the above situations the judge may require or allow the petitioner to join an additional or different party as a respondent if to do so would serve the ends of justice.

28 U.S.C. § 2254, Rules Governing Section 2254 Cases in the United States District Courts, Rule 2 Advisory Committee Notes.

The probation system in Shelby County, however, presents a [3] unique situation. Under the current system, probation needs are often contracted out to private correctional facilities. In the present case, petitioner is under the supervision of one such private probation facility. The court finds that neither the private institution nor its director would be the most appropriate respondent.

Turning to the guidance of the rules governing section 2254 cases and the accompanying advisory committee notes, the court finds that the state attorney general would be a more appropriate respondent. Rule 2(b).[1] Furthermore, as the Advisory Notes point out, "[t]he attorney general is in the best position to inform the court as to who the proper party respondent is. If it is not the attorney general, he can move for a substitution of party."

---

[1] Rule 2(b) provides:

> (b) Applicants subject to future custody. If the applicant is not presently in custody pursuant to the state judgment against which he seeks relief but may be subject to such custody in the future . . . the officer having present custody of the applicant and the attorney general of the state in which the judgment which he seeks to attack was entered shall each be named as respondents.

Id. Accordingly, the Tennessee Attorney General is added as a proper respondent in this action.

The Clerk is directed to serve, by certified mail, a copy of the Order and the underlying petition and amended petition on respondent Charles W. Burson, Attorney General of Tennessee. Furthermore, in accordance with Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, the court has considered the petition preliminarily and directs respondent to file an answer within thirty days of this Order. [4] IT IS SO ORDERED.

/s/ Julia Smith Gibbons
JULIA SMITH GIBBONS
UNITED STATES DISTRICT JUDGE

November 14, 1996
DATE

May 28, 1996
FOR PUBLICATION

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE,	)	Shelby County
Plaintiff-Appellee,	)	Hon. John P. Colton, Jr., Judge
v.	)	
FRANKLIN SANDERS, d/b/a MONEYCHANGER, S.P.,	)	Appeal No. 02S01-9501-CR-00007
Defendant-Appellant.	)	

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Edwin Vieira, Jr.
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OPINION

(Filed May 28, 1996)

JUDGMENT OF COURT OF CRIMINAL APPEALS AFFIRMING CONVICTION AND SENTENCE AFFIRMED.

REID, J.

[2] The primary issue presented in this case is whether the exchange of gold and silver coins and bullion for dollars constitutes the sale of tangible personal property which is subject to sales tax imposed by Tenn. Code Ann. § 67-6-101 *et seq*. A related issue is whether the criminal prosecution of the defendant pursuant to Tenn. Code Ann. § 67-1-1440(d) violated the defendant's constitutional right to due process. Both issues are resolved against the defendant. The record supports the judgment of conviction affirmed by the Court of Criminal Appeals.

The defendant was charged with violating Tenn. Code Ann. § 67-1-1440(d) by delaying the State in the collection of its lawful revenue and, in a separate count, by depriving the State of the realization of its lawful revenue. The defendant was convicted on both counts. The Court of Criminal Appeals reversed the conviction on the first count, on the ground of double jeopardy, and affirmed the conviction on the second count.

The defendant insists that the acts for which he was charged and convicted, which he characterizes as the "exchange" of Federal Reserve notes for silver or gold or the "purchase" of Federal Reserve notes with gold or silver, does not constitute the sale of tangible personal property.

In 1986, the Department of Revenue discovered that the defendant, who was not registered with the Department as a "dealer" under the sales tax statute, was advertising as a dealer in gold and silver bullion and coins and precious [3] metals. The Department also discovered that the state of Arkansas had obtained a judgment against the defendant for sales tax owed on the sale of gold and silver coins and bullion at his place of business in West Memphis, Arkansas. While engaged in business in West Memphis, the defendant placed an advertisement in a Memphis newspaper, which stated: "[i]f you're a Memphis buyer, you save six percent sales tax on any purchase mailed to Tennessee." Soon after the state of Arkansas obtained its judgment for $66,223.51 for sales tax due,the defendant moved his business to Memphis, where he operated under various trade names including "Franklin Sanders Moneychangers" and "Money for Metals."

In July 1986, an agent of the Department purchased several bars of silver from the defendant at the defendant's place of business in Memphis. The defendant did not file a monthly sales tax return for the month of July. In September 1986, when the agent bought several more bars of silver from the defendant, he asked the defendant if sales tax was due on the transaction. The defendant responded that no tax was due because the defendant was purchasing the agent's Federal Reserve notes with silver. As a record of each transaction, the defendant gave the agent a "trade confirmation," which stated:

> [O]ur business legally is buying notes and paying for them in gold and silver. Our acceptance of Federal Reserve notes (the green paper you

> carry in your billfold) in exchange for gold and silver money is a function of our common law 'moneychanging' only, and is not an admission on our part, expressly or implicitly, that we recognize them as [4] lawful or constitutional money.

A search of the defendant's business premises on September 18, 1986, by Revenue Department agents produced evidence of transactions in which the defendant had paid a total of $945,610.69 for U.S. gold coins, U.S. silver coins, Krugerrands and silver bars. During the search, the agents also found evidence of a letter written by the defendant in which he discussed the applicability of the Tennessee sales tax on the transactions. The letter, which was written after the state of Arkansas had obtained its judgment against the defendant, included the following:

> George, I realize that Arkansas can register this judgement [sic] in Tennessee and I realize that they may be able to cause me some trouble, but I don't own anything, nothing is in my name, I just have to hope that that is enough protection. As to the good sales tax people in Tennessee, I am no longer selling anything. Relying on the definition of Federal Reserve Notes at 12 USC 411, I am buying "obligations" and paying for them in lawful gold and silver money. This makes my invoices a bit hard to explain to my customers, but I think it will keep the State of Tennessee at bay.

The issue is whether the transactions were, as contended by the State, taxable sales of tangible personal property, or, as contended by the defendant, non-taxable exchanges of money for money. Consequently, the nature of the property, tangible or intangible, is an important factor.

[5] Tenn. Code Ann. § 67-6-201(1) provides that every person engaged in the business of selling tangible personal property at retail in Tennessee is exercising a taxable privilege. Pursuant to Tenn. Code Ann. § 67-6-501, every dealer who sells tangible personal property is liable for payment of the sales tax. "Sale" is defined by Tenn. Code Ann. § 67-6-102(24)(A) as "any transfer of title or possession, or both, exchange, barter, lease or rental, conditional, or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration. . . . " The term "tangible personal property" is defined by Tenn. Code Ann. § 67-6-102(28) as follows:

> "Tangible personal property" means and includes personal property, which may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses. "Tangible personal property" does not include stocks, bonds, notes, insurance, or other obligations or securities. . . .

The defendant insists that gold and silver bullion and coins are money, *i.e.*, intangible personal property not subject to sales tax. Money is defined in the Uniform Commercial Code as "a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency." Tenn. Code Ann. § 47-1-201(24). Intangible personal property is not defined in Tennessee's tax statutes. However, as used in the law of taxation, intangible property "means such property as has no intrinsic and marketable value, but is merely the representative or evidence of value, such as certificates of stock, bonds, promissory notes, [6] copyrights, and franchises." *Black's Law Dictionary* 809 (6th ed. 1990). This definition is consistent with the specific exclusion of "stocks, bonds, notes, insurance, or other obligations or securities" from the definition of tangible personal property in Tenn. Code Ann. § 67-6-102(28).

Other jurisdictions with sales tax statutes similar to those in Tennessee have held that gold and silver bullion and coins are tangible property subject to sales tax. *Association of Alabama Professional Numismatists Inc. v Eagerton*, 455 So.2d 867 (Ala. Civ. App. 1984); *Revenue Cabinet, Commonwealth of Kentucky v. Saylor*, 738 S.W.2d 426 (Ky. Ct. App. 1987); *Michigan National Bank v. Department of Treasury*, 339 N.W.2d 515 (Mich. Ct. App. 1983); *Northwest Territories Gold & Silver Exchange, Inc. v. Commissioner of Revenue*, 377 N.W.2d 448 (Minn. 1985); *Scotchman's Coin Shop, Inc. v. Administrative Hearing Commission*, 654 S.W.2d 873 (Mo. 1983) (en banc); *Losana Corp. v. Porterfield*, 236 N.E.2d 535 (Ohio 1968); *Thorne and Wilson, Inc. v. Utah State Tax Commission*, 681 P.2d 1237 (Utah 1984).

In *Scotchman's Coin Shop*, the Missouri Supreme Court stated:

> When determining the merits of revenue cases, it is important to look beyond legal fictions and academic jurisprudence in order to discover the economic realities of the case. Expert testimony adduced indicated "money" has value as both a tangible and intangible asset. In order to determine whether the metal tokens were sold as tangible personal property, the essence of the transaction must be examined. It must [7] be determined whether the coins were purchased

> for their tangible value, the value of the precious metal; or for their intangible value as a medium of exchange, the value established irrespective of the value given the precious metal.

654 S.W.2d at 875 (citations omitted).

The evidence in this case establishes the State's position that the transactions on which the defendant failed to collect and remit sales tax were based on the intrinsic value of the precious metals rather than their representative value as a medium of exchange. The most compelling evidence is the "trade confirmations" delivered by the defendant to his customers, which show that the value of each coin was based on its weight, not its value as established by the issuing government. For example, the record shows that one customer paid $8,020.00 for 20 Krugerrands valued at $401.00 per ounce rather than valued according to an exchange rate between dollars and Krugerrands.

The conclusion that the sale of coins is subject to taxation by the State does not interfere with the exclusive constitutional right of the federal government to "coin money." Article I, Section 10 of the United States Constitution.

> Imposition of sales tax on the sale of these coins does not impinge upon the exclusive right of the federal government to regulate the value of money, coin money, or determine the character of legal tender. The tax imposed on these transactions was based [8] on the value of the precious metal; not the intangible value assigned the coins by the federal government. Common sense dictates this regulation has nothing to do

> with the coining of money or the regulation of its value.

Scotchman's Coin Shop, Inc. v. Administrative Hearing Commission, 654 S.W.2d at 876 (citations omitted).

The sales made by the defendant were subject to sales tax, and the defendant's failure to collect and remit tax on those sales violated Tenn. Code Ann. § 67-1-1440(d).

The defendant also contends that, even if the transactions were subject to sales tax, prosecution for failure to collect the tax imposed violated his constitutional right to due process guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I, Section 8 of the Constitution of Tennessee. He claims that he had no fair warning that the statute imposed sales tax on the purchase and sale of gold and silver coins and bullion because the meaning of the statute is "vague or highly debatable." *United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974).

Judge John Peay, writing for the Court of Criminal Appeals, addressed this issue with commendable succinctness. After finding that the federal cases relied upon by the defendant do not support his position, Judge Peay stated:

> In fact, the relevant provisions of Tennessee's [9] Code are rather clear in their applicability to the defendant's transactions. . . . The plain meaning of these statutory provisions is not, as the defendant contends, so vague and ambiguous as to lead one to believe that the sale of gold and silver coins and bullion is not subject to sales tax.

> Even the *Mallas* [*United States v. Mallas,* 762 F.2d 361 (4th Cir. 1985)] court conceded that "a duty not articulated by regulatory language or judicial construction may nonetheless be compelled by the authoritative force of common sense." *Mallas,* 762 F.2d at 364. Furthermore, the *Mallas* court also recognized that "due process does not require the prosecution to cite a litigated fact pattern directly on point." *Mallas,* 762 F.2d at 364 (citing *United States v. Ingredient Technology Corp.,* 698 F.2d 88, 96 (2d Cir. 1983)). In the *Ingredient Technology Corp.* case, the Second Circuit held the following:
>
> > All the Due Process clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden, and thus not lull the potential defendant into a false sense of security, giving him *no reason even to suspect that his conduct might be within its scope.*
>
> *Ingredient Technology Corp.,* 698 F.2d at 96 (quoting *united Sates v. Herrera,* 584 F.2d 1137, 1149 (2d Cir. 1978)) (emphasis added). From a thorough review of the record in this case and the statutory [10] provisions in question, we simply cannot conclude that the defendant's tax obligation is ambiguous as a matter of law. This claim is therefore without merit.

The rules of law regarding the other evidentiary and procedural issues raised by the defendant are well-settled and do not merit Rule 11 review. The resolution of those issues by the Court of Criminal Appeals is affirmed.

The judgment of the Court of Criminal Appeals affirming the defendant's conviction and sentence is affirmed.

Costs are taxed against the defendant.

/s/ Reid, J.
Reid, J.

Concur:

Anderson, C.J., Drowota, and White, JJ.

Birch, J. – Not participating.

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

OCTOBER 1993 SESSION

STATE OF TENNESSEE,)
Appellee,)
)
VS.)
)
FRANKLIN SANDERS,)
d/b/a,)
MONEYCHANGER,)
S. P.,)
)
Appellant.)

C.C.A. NO. 02C01-9305-CR-00102

SHELBY COUNTY

HON. JOHN P. COLTON, JR., JUDGE

(Violations of Sales Tax Laws - T.C.A. § 67-1-1440(d))

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OPINION FILED: AUG 10 1994

COUNT 1 REVERSED AND DISMISSED; AFFIRMED IN ALL OTHER RESPECTS

JOHN H. PEAY,
Judge

[2] OPINION

The defendant was charged in the indictment with one (1) count of delaying the state of Tennessee in the collection of its lawful revenue and with one (1) count of depriving the state of Tennessee of the realization of its lawful revenue, both counts in violation of T.C.A. § 67-1-1440(d). He was found guilty of both counts at a jury trial and received concurrent sentences of one (1) year on each count. The trial court suspended all but thirty (30) days of the sentence, imposed six (6) years probation, and ordered that the defendant pay seventy-three thousand dollars ($73,000) in restitution and complete one thousand (1000) hours of community service.

In this appeal as of right, the defendant presents the following seven (7) issues for review:

> (1) Whether the defendant's prosecution pursuant toT.C.A. § 67-1-1440(1) violated his constitutional right to due process.
>
> (2) Whether the sale of gold and silver coins and bullion are taxable transactions pursuant to T.C.A. § 67-6-101.
>
> (3) Whether the evidence of the amount of sales tax not paid by the defendant is sufficient beyond a reasonable doubt.
>
> (4) Whether the trial court erred in allowing certain testimony of the State's witnesses, in

> disallowing the introduction of legal material upon which the defendant had relied, and in improperly instructing the jury.
>
> (5) Whether the defendant was improperly convicted under the Tax Enforcement Procedures Act.
>
> (6) Whether the convictions constituted a violation of the Double Jeopardy Clause.
>
> (7) Whether the trial court erred in ordering restitution in the amount of seventy-three thousand dollars ($73,000).

[3] We find that the defendant's first five (5) issues and his seventh issue are without merit, and his conviction and restitution order under the second count of the indictment are affirmed. The defendant's sixth issue, however, does have merit and we, therefore, reverse and dismiss the defendant's conviction under the first count of the indictment.

The essential facts of this case are not in serious dispute. In the summer of 1986, the Tennessee Department of Revenue, acting upon tips that some coin dealers were not paying sales tax for their transactions, began an investigation of the defendant. The department discovered that the defendant advertised as a dealer of gold and silver bullion, coins and precious metals. Upon further investigation the department learned that the defendant was not registered with the Department of Revenue for sales tax, as is required under T.C.A. § 67-6-101. The department also learned that there was an outstanding judgment against the defendant from Crittenden County, Arkansas, for sales tax due on the sale of gold and silver coins and bullion in West Memphis, Arkansas. The investigation culminated in an agent of the department purchasing several bars of silver from the defendant in late July, 1986. The department then waited to see if the defendant filed a monthly sales tax return with the Department of Revenue for the sale. When the defendant failed to file such a return, the agent returned to purchase several more bars of silver in early September, 1986. At that time the agent asked the defendant about sales tax on the transaction. The defendant replied that no sales tax was due because he, the defendant, was actually buying the agent's federal reserve notes and paying for them in silver. The defendant handed the agent a "trade confirmation" to that effect.

[4] Using this information, the Special Investigations Unit of the Department of Revenue obtained a search warrant for the business premises of the defendant. On September 18, 1986, several agents of the department executed the warrant and recovered many documents detailing trades in gold and silver coins and silver bullion. These documents were used to develop the current case. At trial the State used several transactions occurring between December, 1983, and November, 1986, and involving a total of five (5) customers to make its case against the defendant. These transactions are as follows:

Customer	Transaction Date	Subject of Trade	Amount Paid	Tax Rate	Alleged Tax Due
Charles Batey	Mar-84	U.S. silver coins	$ 5,000.33	6.75%	$ 337.52
Charles Batey	Apr-84	Krugerrands	$ 8,020.00	7.75%	$ 621.55
Charles Batey	May-84	silver rounds	$ 510.00	7.75%	$ 39.53
Charles Batey	Aug-84	silver bars	$ 2,430.00	7.75%	$ 188.33
Charles Batey	Dec-84	silver bars	$ 2,322.00	7.75%	$ 179.96
Don Webb	Jan-84	U.S. gold coins	$ 11,562.80	6.75%	$ 780.49
Don Webb	Jul-84	U.S. gold coins	$ 7,904.00	7.75%	$ 612.56
Don Webb	Oct-84	U.S. gold coins	$ 26,437.50	7.75%	$ 2,048.91
Jon Thompson	Jan-85	silver bars	$ 12,000.00	7.75%	$ 930.00
Bernard Verhaeghe	Nov-84 to May-85	Krugerrands	$864,078.06	7.75%	$66,966.05
Wade Smith	Jul-86	silver bars	$ 3,432.00	7.75%	$ 265.98
Wade Smith	Sep-86	silver bars	$ 1,914.00	7.75%	$ 148.34
		TOTALS:	$945,610.69		$73,119.20

In his first issue the defendant contends that his entire prosecution violates his right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, § 8 of the Tennessee Constitution. The defendant contends that he was without notice that his conduct would subject him to criminal prosecution. The defendant concludes that this lack of fair notice denies him due process and requires dismissal of the indictment and reversal of his convictions. In support of his argument, the defendant cites *United States v. Mallas*, 762 [5] F.2d 361 (4th Cir. 1985), and its cognate cases.[1]

Initially, we must note that this seemingly ordinary due process/fair notice claim is actually rather complex. *Mallas* and its cognate cases reveal that there are three (3) distinct claims which are possible when a criminal conviction for an alleged tax liability is challenged on due process grounds. The first possible claim is that the statute in question, in this case T.C.A. § 67-1-1440(d), is unconstitutionally vague. The defendant, however, makes it quite clear in his reply brief that he does not challenge T.C.A § 67-1-1440(d) as vague. Hence, we need not rule on whether the statute is unconstitutionally vague.

The second possible claim is that uncertainty in the application of the law denies the defendant due process. The *Harris* court concluded that a "law can be objectively ambiguous . . . so that it fails to provide fair notice as a matter of law." *Harris*, 942 F.2d at 1132. Commenting on the same proposition, the *Mallas* court stated that "where the law is vague or highly debatable, a defendant – actually or imputedly – lacks the requisite intent to violate it." *Mallas*, 762 F.2d at 363 (quoting *Critzer*, 498 F.2d at 1162).

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[1] The principal cognate cases cited by the defendant include *United States v. Harris*, 942 F.2d 1125 (7th Cir. 1991), *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979), and *United States v. Critzer*, 498 F.2d 1160 (4th Cir. 1974).

The defendant contends that the *Mallas* reasoning applies directly to this case. He argues that the issue of his tax liability is "vague and highly debatable," and that the traditional sources of notice (civil, administrative, and criminal precedent) are silent and therefore ambiguous on the subject of potential tax liability for his conduct. The defendant, however, [6] fails to recognize that the cases which he cites in support of his contention are distinguishable from the case at bar. In *Critzer*, the court reversed Critzer's conviction for willfully attempting to evade federal income taxes. The court found that "the government [was] in dispute with itself as to whether the omitted income was taxable." *Critzer*, 498 F.2d at 1160. In fact, Critzer was advised by the Bureau of Indian Affairs, a division of the government, that she was not subject to taxation for rental income for her possessory interest in band property. *Critzer*, 498 F.2d at 1161. In contrast, the defendant in the present case was never advised that his transactions were not subject to Tennessee state sales tax. Moreover, the government is not in dispute with itself on the issue of taxability of the defendant's transactions. In 1981, the office of the Attorney General of Tennessee issued an opinion which stated that the sale of gold and silver coins and bullion is subject to state sales tax.[2]

In *Harris,* the Seventh Circuit Court of Appeals reversed Harris' conviction for willfully evading income tax obligations. The court found that the traditional sources of notice did not provide a clear answer as to whether she had a tax liability. Moreover, the court stated that the closest authority actually favored Harris' position that she did not receive income which was subject to taxation. *Harris,* 942 F.2d at 1128. In the case at bar, however, the 1981 opinion of the Tennessee Attorney General is the closest position of authority on the issue of taxability of the sale of gold and silver coins and bullion, and this opinion clearly states that these transactions are indeed subject to taxation.

Finally, in both *Mallas* and *Dahlstrom,* the respective [7] courts reversed the defendants' convictions for willful evasion of income taxes. Both cases involved unique and complicated tax shelter programs. *Mallas,* 762 F.2d at 362-63; *Dahlstrom,* 713 F.2d at 1427-28. Needless to say, the sale of gold and silver coins and bullion is not nearly as complicated a transaction as is a sophisticated tax shelter program, nor are the provisions of the Tennessee Code pertaining to sales tax as complex as the Internal Revenue Code.

In fact, the relevant provisions of Tennessee's Code are rather clear in their applicability to the defendant's transactions. T.C.A. § 67-6-201(1) declares that every person is exercising a taxable privilege who "[e]ngages in the business of selling tangible personal property at retail in this state." T.C.A. § 67-6-102(1) defines "business" as "any activity engaged in by any person . . . with the object of gain, benefit, or advantage, either direct or indirect." T.C.A. § 67-6-102(23)(A) defines "sale" as "any transfer of title or possession, or both, exchange, barter, lease or rental, conditional, or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration. . . . " T.C.A. § 67-6-102(26) defines "tangible personal property" as "personal property, which may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses. 'Tangible personal property' does not include stocks, bonds, notes, insurance, or other obligations or securities." Finally, T.C.A. § 67-6-102(22)(A) defines "sale at retail" as "a taxable sale of tangible personal property or specifically taxable services to a consumer or to any person for any purpose other than for resale. . . . Any sales for resale must, however, be in strict compliance with rules and regulations promulgated by the commissioner." The plain meaning of these statutory provisions is not, as the defendant contends, [8] so vague and ambiguous as to lead one to believe that the sale of gold and silver coins and bullion is not subject to sales tax.

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[2] 10 op. Att'y Gen. 967 (1981).

Even the *Mallas* court conceded that "a duty not articulated by regulatory language or judicial construction may nonetheless be compelled by the authoritative force of common sense." *Mallas,* 762 F.2d at 364. Furthermore, the *Mallas* court also recognized that "due process does not require the prosecution to cite a litigated fact pattern directly on point." *Mallas,* 762 F.2d at 364 (citing *United States v. Ingredient Technology Corp.,* 698 F.2d 88, 96

(2nd Cir. 1983)). In the *Ingredient Technology Corp.* case, the Second Circuit held the following:

> All the Due Process clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden, and thus not lull the potential defendant into a false sense of security, giving him *no reason even to suspect that his conduct might be within its scope.*

Ingredient Technology Corp., 698 F.2d at 96 (quoting *United States v. Herrera,* 584 F.2d 1137, 1149 (2nd Cir. 1978)) (emphasis added). From a thorough review of the record in this case and the statutory provisions in question, we simply cannot conclude that the defendant's tax obligation is ambiguous as a matter of law. This claim is therefore without merit.

The third possible claim on due process grounds is that the defendant *subjectively* believed that he did not owe sales tax for the transactions at issue. This claim arises from the proposition that "only a 'willful' tax evasion is criminal." *Mallas,* 762 F.2d at 363. The defendant contends that "[i]f the defendant had a subjective good faith belief, no matter how unreasonable, that he was not required to file a tax return, the [9] government cannot establish that the defendant acted willfully." *United States v. Powell,* 955 F.2d 1206, 1211 (9th Cir. 1991) (citing *Cheek v. United States,* 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991)). In the case at bar, the defendant testified as to his belief that his transactions involving gold and silver coins and bullion were not subject to Tennessee state sales tax. He also testified that this belief was arrived at through extensive, thorough legal research. Furthermore, the defendant put on expert testimony concerning some of the legal theories and propositions upon which he had relied in forming his belief.

The State, however, rebutted this argument by offering evidence of a judgment for the state of Arkansas against the defendant for sales tax due on the sale of gold and silver coins and bullion. The state's proof also showed that the defendant, while engaged in the business of selling gold and silver coins and bullion in West Memphis, Arkansas, had placed an advertisement in a Memphis, Tennessee, newspaper which read in pertinent part: "The only difference between their gold & silver and ours is the price. If you're a Memphis buyer, you save *six percent sales tax* on any purchase mailed to Tennessee" (emphasis added). Lastly, the State entered into evidence a letter written by the defendant which was discovered in the search of the defendant's place of business. That letter reads in pertinent part as follows:

> George, I realize that Arkansas can register this judgement [sic] in Tennessee and I realize that they may be able to cause me some trouble, but I don't own anything, nothing is in my name, I just have to hope that that is enough protection. As to the good sales tax people in Tennessee, I am no longer selling anything. Relying on the definition of Federal Reserve Notes at 12 USC 411, I am buying "obligations" and paying for them in lawful gold and silver money. This makes my invoices a bit hard to explain to my customers, but I think it will keep the State of Tennessee at bay.

[10] The decision of whether to credit the defendant's testimony as a good faith belief is a question of fact for

the jury. Questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this Court. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). A guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State. A verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt. *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973).

A defendant challenging the sufficiency of the proof has the burden of illustrating to this Court why the evidence is insufficient to support the verdict returned by the trier of fact in his or her case. This Court will not disturb a verdict of guilt for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

Since the jury was instructed regarding the intent element of the charged offense, the guilty verdict returned by the jury necessarily implies that the jury rejected the defendant's testimony that he had a good faith belief that he had no tax obligation. From a review of the record in this case, we can only conclude that the facts are sufficient, as a matter of law, for a rational trier of fact to find that the defendant did not have a subjective, good faith belief that the transactions at issue were not subject to Tennessee state sales tax. The defendant has

[11] failed to carry his burden, and, therefore, this claim of a denial of due process is without merit.

In the defendant's second issue he contends that exchanges of federal reserve notes for gold and silver coins and bullion are nontaxable exchanges of money for money, and hence, such exchanges cannot form the basis for a prosecution under T.C.A. § 67-1-1440(d). Citing 31 U.S.C.A. §§ 5103, 5112, the defendant argues that domestic gold and silver coins are "money" in the same legal sense as federal reserve notes and base-metallic coins. In addition, the defendant argues that T.C.A. § 47-1-201(24)[3] renders foreign gold coins, such as the Krugerrands involved in this case, "money" as well. The defendant also contends that silver bullion is "money" in and of itself. See *Bronson v. Rodes*, 74 U.S. (7 Wall.) 229, 249-50 (1869). The defendant concludes by arguing that because the State has conceded that exchanges of money for money are not taxable and because all of the transactions at issue in this case involve exchanges of money for money, the transactions which form the basis of this prosecution are not, in fact, taxable. Thus, because there is no tax deficiency, the defendant cannot be properly convicted under T.C.A. § 67-1-1440(d).

In contrast, the State argues that the gold and silver coins and bullion involved in this case fit squarely within the definition of "tangible personal property" pursuant to T.C.A. § 67-6-102(26). Thus, since the coins and bullion involved in this case fit within this definition and are not specifically excluded by any provision of the statute, their sale is a taxable transaction pursuant to T.C.A. § 67-6-201(1).

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[3] T.C.A. § 47-1-201(24) states that: " '(m)oney' means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency."

[12] In resolving this point of contention, we must look beyond the contested, varying surface meanings of terms such as "money," "legal tender," and "medium of exchange." Instead we must delve into the substance, particularly the economic substance, of the transactions at issue. *See Scotchman's Coin Shop, Inc. v. Administrative Hearing Commission,* 654 S.W.2d 873, 875 (Mo. 1983) (en banc). Several states with sales tax statutes similar to those of Tennessee have considered this issue. These states have ruled that the question of taxability turns on "whether the coins were purchased for their tangible value, the value of the precious metal; or for their intangible value as a medium of exchange, the value established irrespective of the value given the precious metal." *Scotchman's Coin Shop, Inc.,* 654 S.W.2d at 875 (citation omitted). *See also Thorne and Wilson, Inc. v. Utah State Tax Comm'n,* 681 P.2d 1237 (Utah 1984); *Michigan Nat'l Bank v. Michigan Dep't of Treasury,* 339 N.W.2d 515 (Mich. Ct. App. 1983); *Revenue Cabinet, Commonwealth of Kentucky v. Byrd Saylor, Jr.,* 738 S.W.2d 426 (Ky. Ct. App. 1987); *Losana Corp. v. Porterfield,* 236 N.E.2d 535 (Ohio 1968). We agree with this analysis and find that it is applicable to the transactions at issue in this case.

A careful review of the record shows that in each of the transactions involved in this case, the defendant's own "trade confirmations" valued the gold and silver coins and bullion according to their precious metal content. In contrast, the record contains no conclusive evidence that any of the defendant's customers purchased the coins or bullion for use as currency, irrespective of their intrinsic value. We find that because the coins and bullion involved were sold according to their intrinsic value, they properly fall within the meaning of "tangible personal property," and their sale is therefore subject to state sales tax [13] pursuant to T.C.A. § 67-6-201(1).

The defendant also argues that if the exchange of federal reserve notes for gold and silver coins and bullion is deemed to be subject to taxation, then the Tennessee sales tax statute unconstitutionally and impermissibly interferes with the exercise of Congress' monetary power. *See* U.S. Const. art. I, § 8, cl. 5; U.S. Const. art I, § 10, cl. 1; *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 425-36 (1819); *Thompson v. Butler,* 95 U.S. 694, 696 (1878).

Other states have considered this issue and have ruled that the imposition of sales tax on the sale of gold and silver coins and bullion is constitutional. In *Scotchman's Coin Shop, Inc.,* 654 S.W.2d at 876 (citing *Losana Corp.,* 236 N.E.2d at 536) Missouri's Supreme Court held the following:

> Imposition of sales tax on the sale of these coins does not impinge upon the exclusive right of the federal government to regulate the value of money, coin money, or determine the character of legal tender. . . . The tax imposed on these transactions was based on the value of the precious metal; not the intangible value assigned the coins by the federal government. Common sense dictates this regulation has nothing to do with the coining of money or the regulation of its value.

We find this reasoning sound as it applies to the case at bar. The defendant's second issue on appeal is therefore also without merit.

In his third issue the defendant challenges the sufficiency of the evidence of the amount of sales tax due necessary to sustain his conviction. The defendant was charged with delaying and depriving the state in the collection and realization of sales tax revenue in excess of five thousand [14] dollars ($5000). The defendant maintains that the only transactions which could possibly be subject to taxation are the sales of bullion and two (2) sales of coins which, according to testimony, were for "investment" purposes. Although the defendant's assertion that these sales do not render a sales tax in excess of five thousand dollars ($5000) is correct, the defendant erroneously assumes that these sales are the only taxable transactions. In fact, while considering the defendant's second issue on appeal, we found that all of the transactions which are involved in this case are subject to sales tax, not just the ones involving bullion and coins admittedly acquired for "investment" purposes.

In recognition of the aforementioned standard of review for sufficiency issues and after a review of the record, we conclude that the facts are sufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of delaying and depriving the state in the collection and realization of sales tax revenue in excess of five thousand dollars ($5000). The defendant has failed to carry his burden. This issue is therefore without merit.

In his fourth issue the defendant challenges the trial court's allowance of certain testimony regarding customer intent, the trial court's denial of certain defense requests concerning legal materials upon which the defendant relied, and the trial court's denial of special jury instructions. The first allegation of error is that the trial court improperly allowed three (3) of the defendant's customers to testify that they had not intended to sell the defendant federal reserve notes in exchange for gold or silver coins or bullion, even though language in the defendant's "trade confirmations" indicates that buying federal [15] reserve notes was the defendant's intent. The defendant contends that the trade confirmations were contracts, and thus the parol evidence rule should have prevented the admission of the testimony of the customers regarding their intent.

Initially, we must note that these trade confirmations were not signed by the customers and were, in fact, merely handed to the customers upon the completion of the transaction. This evidence supports the State's position that the trade confirmations were actually receipts rather than contracts. In his brief, even the defendant describes the trade confirmations as "written confirmations of his *oral contracts* with his customers, which *expressly evidenced [the defendant's] intent*" (emphasis added). Therefore, the primary purpose of the trade confirmations seems to have been to express the defendant's intent regarding the exchanges of federal reserve notes for gold or silver coins or bullion. These confirmations, an expression of the defendant's intent, were entered into evidence, and the defendant also testified personally as to his intent regarding these exchanges. Since there was ample evidence concerning the defendant's intent regarding the *oral contracts* for the exchange of federal reserve notes for gold or silver coins or bullion, we do not believe that it was error for the trial court to allow the customers to testify as to their intent with regard to the same transactions.

Moreover, we fail to see the ultimate point of the defendant's argument. The defendant contends that allowing the customers to testify as to their intent somehow amounts to a violation of due process, claiming that this testimony impermissibly undermines his position that he had a good faith belief that he was not subject to sales tax and therefore could [16] not have formed the "willful" intent necessary to sustain a criminal conviction under T.C.A. § 67-1-1440(d). The defendant maintains that the customers' testimony "misled the jury into thinking that [the defendant] intended what his customers did," thereby striking at the heart of his good faith defense that he did not believe the exchanges at issue to be subject to taxation.

From a thorough examination of the record we find no reason to suspect that the jury imputed the customers' intent to the defendant. Instead, it appears that the jury considered the defendant's testimony and the trade confirmations as an expression of the defendant's intent, and the customers' testimony as an expression of their own personal intent. Thus, even if the allowance of the customers' testimony concerning intent was error, we are satisfied that such an error was harmless beyond a doubt because there is nothing in the record which suggests that the jury considered the customers' testimony as bearing on the sincerity of the defendant's stated belief that the transactions at issue were not taxable. *See* T.R.A.P. 36(b); Tenn. R. Crim. P. 52(a).

The second allegation of error in the defendant's fourth issue is that the trial court erroneously refused to allow into evidence legal materials upon which the defendant relied in forming his belief that the transactions at issue were not subject to sales tax. The defendant cites *United States v. Powell* for the proposition that "[i]n § 7203 prosecutions, statutes or case law upon which the defendant claims to have *actually relied* are admissible to disprove that element [willfulness] if the defendant lays a proper foundation which demonstrates such reliance." *Powell*, 955 F.2d at 1214 (citing *Harris*, 942 F.2d at 1132 (emphasis in original). In the present case, the defendant claims [17] to have relied upon a great amount of legal materials in arriving at his alleged belief that he was not subject to sales tax for his exchanges of gold and silver coins and bullion for federal reserve notes. He, of course, testified personally as to his research and the conclusions that he reached concerning the taxability of the transactions at issue. Yet the defendant also wished to enter these materials into evidence to support his claim of a good faith misunderstanding of the law.

Initially, we must note that the *Powell* court stated that a court "*ordinarily* cannot exclude evidence relevant to the jury's determination of what a defendant thought the law was in § 7203 cases because willfulness is an element of the offense." *Powell*, 955 F.2d at 1214 (emphasis added). The case at bar, however, is far from ordinary. We believe that the record supports the trial court's finding that the probative value of entering these materials into evidence was substantially outweighed by the possibility of misleading the jury and confusing the issues. We agree with the trial court's finding that the danger was too great that the jury would improperly consider such evidence for its validity or soundness as law, and not for its reflection upon the defendant's state of mind. In considering the entire record in this case, we are satisfied that the jury gained a complete and accurate understanding of the defendant's state of mind from the defendant's own testimony and from the trade confirmations which were entered into evidence. Even if it was error for the trial court to exclude the materials upon which the defendant claims to have relied, it was harmless beyond a doubt. *See* T.R.A.P. 36(b); Tenn. R. Crim. P. 52(a).

The third allegation of error in the defendant's fourth issue is that the trial court erroneously denied certain jury [18] instructions requested by the defendant. The defendant requested specific jury instructions regarding willfulness and good faith. Specifically the defendant requested that the jury be instructed that it must find that the defendant acted "feloniously" ("willfully") by committing "a voluntary, intentional violation of a known legal duty." *United States v. Bishop,* 412 U.S. 346, 360, 93 S.Ct. 2008, 36 L.Ed.2d 941 (1973). The trial court denied this request, choosing instead to instruct the jury on "intentionally," "knowingly," and "by design." The trial court also instructed the jury that the mere failure of the defendant to file tax returns does not prove the crime charged.

This Court has concluded that where a court's instruction "was a correct statement of Tennessee law, and it adequately covered the subject matter contained in the special request . . . the trial judge committed no error in declining to give the requested charge." *Shell v. State,* 584 S.W.2d 231, 235 (Tenn. Crim. App. 1977). Although it may have been preferable to charge the jury on "willfulness", we are satisfied that the instructions given by the trial court adequately informed the jury as to the requisite level of *mens rea* necessary to convict the defendant. The defendant's fourth issue on appeal and each of the assignments of error contained therein are therefore without merit.

In his fifth issue the defendant challenges the failure of the State to follow certain procedures under the Tax Enforcement Procedures Act ("TEPA")[4] prior to indicting the defendant. Specifically, the defendant claims that under TEPA, the State must make a prior determination that the defendant owed lawful revenue before proceeding against him in a criminal case. [19] According to the defendant, this prior determination should have been in the form of an assessment, "the foundation of the claim of the government [for taxes]." *Malone v. Williams,* 118 Tenn. 390, 103 S.W. 798, 808 (Tenn. 1907).

The defendant's reasoning, however, is misguided. Violations of revenue laws may be proceeded against under two (2) distinct types of actions – civil and criminal. As other courts have found, different procedures attach to each type of action. *See, e.g., State v. Alioto,* 219 N.W.2d 585, 591-92 (Wis. 1974). While an assessment may be a necessary predicate to collect taxes in a civil action, it has nothing whatsoever to do with a criminal prosecution under T.C.A. § 67-1-1440(d). A criminal conviction under T.C.A. § 67-1-1440(d) requires the State to prove each element of the offense beyond a reasonable doubt, but an assessment is not a prerequisite for criminal prosecution.

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[4] T.C.A. §§ 67-1-1401 to -1444.

The defendant, however, states in his reply brief that he was not arguing in his original brief that a prior assessment was necessary for a criminal prosecution under T.C.A. § 67-1-1440(d). Instead, the defendant contends that because the State did not comply with the assessment provisions of TEPA and because there was no other source of pre-indictment notice that exchanges of federal reserve notes for gold and silver coins and bullion are subject to sales tax given to the defendant, his conduct did not rise to the level of a "willful" violation of the law since he believed in good faith that the transactions at issue were not taxable. In effect, the defendant is making the statutory analog of the constitutional due process claim advanced in his first issue.

First and foremost, we express serious concern about the [20] manner in which the defendant has framed this issue. The language of the argument in his original brief is clear. The defendant challenged the failure of the State to follow certain procedures under TEPA, particularly the assessment provisions. The defendant has reframed this issue through his reply brief in such a way as to enlarge his original argument to the point of actually changing his argument. The defendant cannot change issues from his original brief to his reply brief any more than he can change theories from the trial court to the appellate court. *State v. Matthews*, 805 S.W.2d 776, 781 (Tenn. Crim. App. 1990); *State v. Aucoin*, 756 S.W.2d 705, 715 (Tenn. Crim.

App. 1988). This issue, as framed in the reply brief, is therefore waived.

Nonetheless, we will address this argument because we believe that, in effect, we have already considered it in the defendant's first issue on appeal. The defendant asserts that this argument is the statutory analog of the constitutional argument in his first issue on appeal. This Court has already considered the defendant's first issue, and we have found it to be meritless. In discussing that issue, we concluded that from a review of the record in this case, the evidence was sufficient for the jury to have found that the defendant had, in fact, believed that his exchanges were taxable and that he had intentionally avoided paying the taxes. The defendant's fifth issue is likewise without merit.

In his sixth issue the defendant challenges the trial court's failure to dismiss the first count of the indictment on double jeopardy grounds. The defendant argues that the State impermissibly used the exact same course of conduct to convict the defendant of two (2) violations of the same statute under the guise that he both "delayed" the State in the collection of its [21] lawful revenue and "deprived" the State of the realization of its lawful revenue. The State, on the other hand, argues that "delaying" and "depriving" are separate and distinct crimes which do not involve the same elements and that the defendant "delayed" the payment of sales tax by failing to timely pay the tax when it was due and "deprived" the State of the tax due when he later failed to pay the tax at all.

T.C.A. § 67-1-1440(d) reads as follows:

> It is a Class E felony for any person to delay, hamper, hinder, impede, obstruct or thwart the state of Tennessee in the collection of any of its lawful revenue, or to deprive the state of the realization of such revenue at *the time it is lawfully entitled thereto* by any artifice, design, false weight or measure, strategem, or by the falsification of any record, report or return required by law. Each act done in violation hereof is a separate offense (emphasis added).

When read in full, the meanings of "deprive . . . at the time it is lawfully entitled thereto" and "delay" converge. Thus, when the State attempts to prove the offense of "delaying" by claiming that "the defendant delayed the payment of sales tax to the State by failing to timely pay the proper sales tax due at the time it was due," it is actually duplicating the case for "depriving the State of . . . revenue at the time it is lawfully entitled thereto."

We therefore find that the same acts cannot be used to prove that the defendant, at the same time, both "delayed" and "deprived . . . at the time lawfully entitled thereto" for the purposes of T.C.A. § 67-1-1440(d). The State has improperly charged a single offense through two (2) counts of an indictment, in violation of the guarantee against double jeopardy. *See* U.S. Const. amend. XIV § 1; Tenn. Const. art. I, § 10; *see e.g., Launius v. United States*, 575 F.2d 770, 771 (9th Cir. 1978). [22] Accordingly, we reverse the defendant's conviction for "delaying the state of Tennessee in the collection of its lawful revenue," and hereby dismiss the first count of the indictment.

In his final issue the defendant challenges the trial court's order imposing seventy-three thousand dollars ($73,000) in restitution. The defendant asserts that the trial court's restitution order in the amount of seventy-three thousand dollars ($73,000) assumes that all of the transactions at issue in this case were taxable. The defendant argues that it is uncertain as to whether or not all of the transactions were taxable, and thusly, the guilty verdict only required the jury to find five thousand dollars ($5000) in tax liability. Hence, the defendant contends that the trial court could only impose restitution in the amount of five thousand and one dollars ($5001).

T.C.A. § 40-35-304(a) specifically authorizes the sentencing court to impose restitution as a condition of probation. If the sentencing court orders restitution, T.C.A. § 40-35-304(b) directs the court to request that documentation regarding the nature and amount of the victim's pecuniary loss be included in the presentence report. Such information is absent from the presentence report in this case. This lack of documentation, however, does not harm the defendant because the trial court held a sentencing hearing "to give the defendant full consideration under the law regarding restitution." *State v. Moore,* 814 S.W.2d 381, 384 (Tenn. Crim. App. 1991). However, there was no proof offered on this issue by either party at the sentencing hearing. At trial the defendant testified that Verhaeghe had requested that he "buy" gold for him. Given the lack of documentation in the presentence report, the trial court determined that the evidence at trial supported restitution in the [23] amount of seventy-three thousand dollars ($73,000).

When an appellant challenges the amount of restitution that he has been ordered to pay as a condition of probation, we conduct a de novo review of the amount and the method by which it was computed. T.C.A. § 40-35-401(d). In conducting this review, we must consider, in addition to other factors, any evidence received at the trial or sentencing hearing. *State v. Brown*, 832 S.W.2d 594, 595 (Tenn. Crim. App. 1992). In the present case, the State presented evidence concerning several transactions between the defendant and five (5) customers. The defendant disputed the taxability of these transactions, but he did not dispute the amount of money involved in each of the exchanges. In addressing the defendant's second issue on appeal, we concluded that all of the transactions at issue in this case are properly subject to sales tax. Given this finding, we can only conclude that the evidence in the record fully supports the trial court's imposition of seventy-three thousand dollars ($73,000) in restitution. This issue is therefore without merit.

For the reasons set out above, the defendant's conviction under the second count of the indictment, for depriving the state of the realization of its lawful revenue at the time it is legally entitled thereto, is affirmed. Because we find that the defendant's conviction under the first count of the indictment constitutes double jeopardy, that conviction is reversed and that count of the indictment is hereby dismissed. As to all other issues, the judgment of the trial court is affirmed.

/s/ John H. Peay
JOHN H. PEAY, Judge

[24] CONCUR:

/s/ Adolpho A. Birch, Jr.
ADOLPHO A. BIRCH, JR., Judge

/s/ Paul G. Summers
PAUL G. SUMMERS, Judge

UNITED STATES CONSTITUTION

Article I, § 8, cl. 5

The Congress shall have Power * * * (5) To coin Money, regulate the Value thereof, and of foreign Coin;

Article I, § 8, cl. 6

The Congress shall have Power * * * (6) To provide for the Punishment of counterfeiting the * * * current Coin of the United States;

Article I, § 10, cl. 1

No State shall * * * coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts * * * .

Article VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment XIV, § 1

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * * .

UNITED STATES STATUTES
(United States Code)

12 U.S.C. § 411

Federal Reserve Notes, to be issued at the discretion of the Board of Governors of the Federal Reserve System for the purpose of making advances to Federal reserve banks through the Federal reserve agents as hereinafter set forth and for no other purpose, are authorized. The said notes shall be obligations of the United States and shall be receivable by all national and members banks and Federal reserve banks and for all taxes, customs, and other public dues. They shall be redeemed in lawful money on demand at the Treasury Department of the United States, in the city of Washington, District of Columbia, or at any Federal Reserve bank.

18 U.S.C. § 485

Whoever falsely makes, forges, or counterfeits any coin or bar in resemblance or similitude of any coin of a denomination higher than 5 cents or any gold or silver bar coined or stamped at any mint or assay office of the United States, or in resemblance or similitude of any foreign gold or silver coin current in the United States or in actual use and circulation as money within the United States * * * [s]hall be fined under this title or imprisoned not more than fifteen years, or both.

31 U.S.C. § 5101

United States money is expressed in dollars * * * .

31 U.S.C. § 5103

United States coins and currency (including Federal reserve notes * * *) are legal tender for all debts, public charges, taxes, and dues. Foreign gold or silver coins are not legal tender for debts.

31 U.S.C. § 5112(a, b, c, e, f, h, i)

(a) The Secretary of the Treasury may mint and issue only the following coins:

(1) a dollar coin that is 1.043 inches in diameter.

(2) a half dollar coin that is 1.205 inches in diameter and weighs 11.34 grams.

(3) a quarter dollar coin that is 0.955 inch in diameter and weighs 5.77 grams.

(4) a dime coin that is 0.705 inch in diameter and weights 2.268 grams.

(5) a 5-cent coin that is 0.835 inch in diameter and weighs 5 grams.

(6) except as provided under subsection (c) of this section, a one-cent coin that is 0.75 inch in diameter and weighs 3.11 grams.

(7) A fifty dollar gold coin that is 32.7 millimeters in diameter, weighs 33.931 grams, and contains one troy ounce of fine gold.

(8) A twenty-five dollar gold coin that is 27.0 millimeters in diameter, weighs 16.966 grams, and contains one-half troy ounce of fine gold.

(9) A ten dollar gold coin that is 22.0 millimeters in diameter, weighs 8.483 grams, and contains one-fourth troy ounce of fine gold.

(10) A five dollar gold coin that is 16.5 millimeters in diameter, weighs 3.393 grams, and contains one-tenth troy ounce of fine gold.

(b) The half dollar, quarter dollar, and dime coins are clad coins with 3 layers of metal. The 2 identical outer layers are an alloy of 75 percent copper and 25 percent nickel. The inner layer is copper. * * * The dollar coin shall be golden in color, have a distinctive edge, have tactile and visual features that make the denomination of the coin readily discernible, be minted and fabricated in the United States, and have similar metallic, anti-counterfeiting properties as United States coinage in circulation on the date of enactment of the United States $1 Coin Act of 1997. The 5-cent coin is an alloy of 75 percent copper and 25 percent nickel. * * * Except as provided under subsection (c) of this section, the one-cent coin is an alloy of 95 percent copper and 5 percent zinc. * * *

* * *

(c) The Secretary may prescribe the weight and the composition of the copper and zinc in the alloy of the one-cent piece * * * when the Secretary decides that a different weight and alloy of copper and zinc are necessary to ensure an adequate supply of one-cent coins to meet the needs of the United States.

* * *

(e) Notwithstanding any other provision of law, the Secretary shall mint and issue, in quantities sufficient to meet public demand, coins which –

(1) are 40.6 millimeters in diameter and weigh 31.103 grams;

(2) contain .999 fine silver * * * .

(f) Silver coins.

(1) Sales price. The Secretary shall sell the coins minted under subsection (e) to the public at a price equal to the market value of the bullion at the time of

sale, plus the cost of minting, marketing, and distributing such coins (including labor, materials, dies, use of machinery, and promotional and overhead expenses).

* * *

(h) The coins issued under this title shall be legal tender as provided in section 5103 of title 31, United States Code.

(i)(1) Notwithstanding section 5111(a)(1) of this title, the Secretary shall mint and issue the gold coins described in paragraphs (7), (8), (9), and (10) of subsection (a) of this section, in quantities sufficient to meet public demand * * * .

(2)(A) The Secretary shall sell the coins minted under this subsection to the public at a price equal to the market value of the bullion at the time of sale, plus the cost of minting, marketing, and distributing such coins (including labor, materials, dies, use of machinery, and promotional and overhead expenses). * * *

31 U.S.C. § 5118(a) & (d)

(a) In this section –

(1) "gold clause" means a provision in or related to an obligation alleging to give the obligee a right to require payment in –

(A) gold;

(B) a particular United States coin or currency; or

(C) United States money measured in gold or a particular United States coin or currency.

* * *

(d)(1) In this subsection, "obligation" means any obligation (except United States currency) payable in United States money.

(2) An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977.

TENNESSEE STATUTES[1]
(Tennessee Code Annotated)

T.C.A. § 47-1-201(24)

(24) "Money" means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency * * * .[2]

T.C.A. § 47-1-201(26-28)

(26) A person "notifies" or "gives" a notice or notification to another by taking such steps as may reasonably be required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when:

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[1] The text shows the numbering and language of the statutes at the time of Sanders' prosecution. Numbering in brackets ([ ]) is the present version of the code.

[2] The present statute provides that " 'Money' means a medium of exchange authorized or adopted by a domestic or foreign government and includes a monetary unit of account established by an intergovernmental organization or by agreement between two (2) or more nations".

(a) it comes to his attention; * * *

(27) Notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction * * *

(28) "Organization" includes a corporation, government or governmental subdivision or agency * * * .

T.C.A. § 47-2-202

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

(a) by a course of dealing or usage of trade * * * or by course of performance * * * ; and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

T.C.A. § 67-1-1440(d)

(d) It is a Class E felony for any person to delay, hamper, hinder, impede, obstruct or thwart the state of Tennessee in the collection of any of its lawful revenue, or to deprive the state of the realization of such revenue at the time it is lawfully entitled thereto by any artifice, design, false weight or measure, strategem, or by the falsification of any record, report or return required by law. Each act done in violation hereof is a separate offense.

T.C.A. § 67-6-102(1) [§ 67-6-102(2)]

(1) "Business" includes any activity engaged in by any person * * * with the object of gain, benefit, or advantage, either direct or indirect. * * *

T.C.A. § 67-6-102(6)(C) [§ 67-6-102(7)(C)]

(6) "Dealer" means every person * * * who * * *

(C) Sells at retail, or who offers for sale at retail, or who has in such person's possession for sale at retail, or for use, consumption, distribution, or storage to be used or consumed in this state, tangible personal property as defined herein * * * .[3]

T.C.A. § 67-6-102(22) [§ 67-6-102(24)(A)]

(22) "Retail sales" or "sale at retail" means a taxable sale of tangible personal property * * * to a customer or to any person for any purpose other than resale. * * *

T.C.A. § 67-6-102(23)(A) [§ 67-102(25)(A)]

(23)(A) "Sale" means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration * * * .

T.C.A. § 67-6-102(24) [§ 67-6-102(26)]

(24) "Sales price" means the total amount for which a taxable service or tangible personal property is sold,

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[3] The language of the present statute changes "as defined herein" to "as defined in this section".

including any services that are a part of the sale of tangible personal property, valued in money, whether paid in money or otherwise * * * .

T.C.A. § 67-6-102(26) [§ 67-6-102(29)]

(26) "Tangible personal property" means and includes personal property, which may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses. "Tangible personal property" does not include stocks, bonds, notes, insurance, or other obligations or securities. * * * [4]

T.C.A. 67-6-201(1)

It is declared to the the legislative intent that every person is exercising a taxable privilege who:

(1) Engages in the business of selling tangible personal property at retail in this state * * * .

T.C.A. 67-6-202(a)

(a) For the exercise of the privilege of engaging in the business of selling tangible personal property at retail in this state, a tax is levied at the rate of six percent (6%) of the sales price of each item of tangible personal property when sold at retail in this state; the tax is to be computed on gross sales for the purpose of remitting the amount of tax due the state and is to include each and every retail sale.

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[4] The present section contains added language not relevant to this case.

T.C.A. § 67-6-501(a-c)

(a) Every dealer making sales, whether within or outside the state, of tangible personal property, for distribution, use, or other consumption within this state, or furnishing any of the things or services taxable under this chapter, shall be liable for the tax imposed by this chapter.

(b) The tax shall be collected from the dealer as defined herein and paid at the time and in the manner as hereinafter provided.

(c) The aforementioned tax at the rate provided by law of the retail sales price, as of the moment of sale, or of the cost price, as of the moment of purchase, as the case may be, shall be collectible from all persons, as defined in § 6-6-102, engaged as dealers, as defined in § 6-6-102, in the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of tangible personal property, or in the furnishing of any of the things or services taxable under this chapter.

T.C.A. § 67-6-504(a-b)

(a) The taxes levied under this chapter shall be due and payable monthly, on the first day of each month, and for the purpose of ascertaining the amount of tax payable under this chapter, it shall be the duty of all dealers on or before the twentieth day of each month to transmit to the commissioner, upon forms prescribed, prepared and furnished by him, returns, showing the gross sales, or purchases, as the case may be, arising from all sales and purchases taxable under this chapter during the preceding calendar month.

(b) At the time of transmitting the return required hereunder to the commissioner, the dealer shall remit to him therewith the amount of tax due under the applicable provisions of this chapter, and failure to so remit such tax shall cause the tax to be delinquent. * * * [5]

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[5] The present section replaces the word "him" with the words "the commissioner", but is otherwise identical.

In the
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FRANKLIN SANDERS,)
Petitioner,)
)
v.) No. 96-2698-G
WILLIAM FREEMAN,)
DIRECTOR, SHELBY)
COUNTY)
CORRECTIONAL)
CENTER,)
)
Respondent.)

AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS

INTRODUCTION

Pursuant to 28 U.S.C. § 2254, Petitioner Franklin Sanders hereby files this AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS.

In his original PETITION FOR WRIT OF HABEAS CORPUS, filed with this Court on 08 July 1996 pursuant to 28 U.S.C. § 2254, Sanders set out basic issues which he contended, and here contends, entitled him to habeas corpus relief. Because, as explained on page 1 of the original PETITION, "time was of the essence", the said PETITION did not contain all of the issues, and all of the factual detail and legal argument on the issues presented, that Sanders believes should be set forth. This AMENDMENT TO PETITION is intended to incorporate, supplement, and state in re-arranged order the issues Sanders brought before the Court in his original PETITION.

[2] STATEMENT OF THE ISSUES PRESENTED FOR *HABEAS CORPUS* REVIEW

I. Sanders' petition for habeas corpus must be granted, and his conviction set aside, because the Tennessee courts prosecuted Sanders and affirmed his conviction in the face of the constitutional rule of *United States* v. *Mallas*, 762 F.2d 316 (4th Cir. 1985), and cognate cases.

II. Sanders' petition for habeas corpus must be granted, and his conviction set aside, because the Tennessee courts prosecuted Sanders and upheld his conviction in the face of the Constitution, conflicting monetary laws, and controlling judicial precedents of the United States.

III. Sanders' petition for habeas corpus must be granted, and his conviction set aside, because the Tennessee courts prosecuted Sanders and upheld his conviction in the face of the State's failure to prove either: (i) the major element of its case at trial -- namely, that Sanders' exchanges generated a sales-tax revenue "exceeding five thousand dollars", as alleged in the indictment; or (ii) the "tangible-value" theory later excogitated by the Court of Criminal Appeals.

IV. Sanders' petition for habeas corpus must be granted, and his conviction set aside, because the Tennessee courts convicted Sanders and upheld his conviction notwithstanding the State's use of unconstitutional evidence as to his supposed criminal intent.

V. Sanders' petition for habeas corpus must be granted, and his conviction set aside, because the Tennessee courts convicted Sanders and upheld his conviction notwithstanding the trial court's unconstitutional exclusion of evidence critical to Sanders' defense that he lacked criminal intent.

VI. Sanders' petition for habeas corpus must be granted, and his conviction set aside, because the Tennessee courts convicted Sanders and upheld his conviction notwithstanding the trial court's unconstitutional [3] jury-instructions that dispensed with "willfullness" as an element of "felonious" conduct.

VII. Sanders' petition for habeas corpus must be granted, and the imposition of $73,000 in "restitution" against him set aside, because there was no rational evidentiary basis for such imposition.

STATEMENT OF THE CASE

Sanders was indicted in Shelby County, Tennessee, on 18 September 1989. The indictment charged violations of Tennessee Code § 67-1-1440(d), as follows:

> *First Count:* "that FRANKLIN SANDERS d/b/a F. SANDERS, MONEYCHANGER, S.P. during a period between December 1, 1983 and November 1, 1986 * * * did unlawfully and feloniously delay the State of Tennessee in the collection of its lawful revenue, to-wit, sales tax revenue, of an amount exceeding five thousand dollars ($5,000.00) by design in that he, FRANKLIN SANDERS, failed to file monthly sales tax returns required by law * * * ."

> *Second Count:* "that FRANKLIN SANDERS d/b/a F. SANDERS, MONEYCHANGER, S.P. during a period between December 1, 1983 and November 1, 1986 * * * did unlawfully and feloniously deprive the State of Tennessee in the collection of its lawful revenue, to-wit, sales tax revenue, of an amount exceeding five thousand dollars ($5,000.00) by design in that he, FRANKLIN SANDERS, failed to file monthly sales tax returns required by law * * * ."[1]

Record at 3-5.[2] In May of 1992, trial was held in the Criminal Court of Shelby County, Division III. The jury found Sanders guilty on both counts "in failing to file monthly sales tax returns as charged". R., Vol. 17, at 35; 255.

The Criminal Court sentenced Sanders to one year of imprisonment on [4] each count, the sentences to be served concurrently but "suspended except for * * * thirty days confinement". The court also ordered restitution of $73,000, "paid out at $1000.00 per month with a probation of six years", and "1000 hours community service". R., Vol. 20, at 36-37. On appeal, the Tennessee Court of Criminal Appeals reversed Sanders' conviction on the first count of the indictment on the grounds of double jeopardy,[3] but affirmed his conviction on the second count. The Tennessee Supreme Court also affirmed.[4] The opinion of the Tennessee Supreme Court was filed on 28 May 1996, and its mandate issued on 18 June 1996. Sanders moved to recall the mandate; but his motion was denied on 27 June 1996. Sanders was arrested and taken into custody on 28 June 1996.

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[1] T.C.A. § 67-1-1440(d) (1994) provides that "[i]t is a class E felony for any person to delay, hamper, hinder, impede, obstruct or thwart the state of Tennessee in the collection of any of its lawful revenue, or to deprive the state of the realization of such revenue at the time it is lawfully entitled thereto by any artifice, design, false weight or measure, stategem, or by the falsification of any record, report or return required by law".

[2] Hereinafter, Sanders will cite the Record in the Tennessee appellate courts as follows: "R. at ___", "R., Vol. ___, at ___".

Sanders has exhausted all State remedies.

STATEMENT OF THE FACTS

I. The operative facts.

During the period charged in the indictment, Sanders was a "moneychanger" in Memphis, Tennessee, "exchang[ing] gold and silver for paper money and vice versa". R., Vol. 14, at 8. To Sanders – and to the State and the Tennessee courts as well, which never challenged his definition – a "moneychanger" is " 'one whose occupation is the exchanging of kinds or denominations of currency' ".[5] The Criminal Court conceded [5] that "[i]t was

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[3] Ct. Crim. App. Slip Op. at 20-22, attached to this AMENDED PETITION. As the State did not appeal on this issue, Sanders will not consider it further.

[4] Sup. Ct. Slip Op., attached hereto.

[5] Arnold v. City of Chicago, 56 N.E.2d 795, 796 (Ill. 1944):

> The common meaning of the term pertained to those who in early history engaged in the business of foreign exchange. * * * [A]fter bullion was superseded by coin and each nation or peoples had a coin of its own, merchants dealing with these various nations or peoples would, necessarily, in the course of their business or trade, receive coins belonging to different

shown [at the hearing on Sanders' motion to dismiss the indictment] that [Sanders] * * * is a money changer", but nevertheless held that "proof must be submitted during a trial concerning money changing or any other occupation wherein [Sanders] might be required to pay sales tax". R. at 30. However, the court later instructed the jury (in line with Sanders' definition) that

> a money changer is one whose occupation is the exchanging of kinds of denominations of currency, and the common meaning of the term pertaining to those persons who, in early history, engaged in the business of foreign

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> nations and hence would be applied to by strangers who wished to exchange their own money for the money of the country in which they sojourned.
>
> It appears that merchants attending foreign markets brought with them gold in bars and quantities of fine silver, which they exchanged on the spot for the currency or coin of the place where their business was to be transacted. Charges were made for these exchanges and the business of money changing became very lucrative. This we deem to be the commonly accepted understanding of the meaning of the term "money changers."
>
> * * * "A money-changer is defined * * * to be 'a broker who deals in money or exchanges.' The word has passed out of common use, but when used, we understand it in [that] sense * * * . Thus defined, it is certainly included in the business of a banker, and constitutes, indeed, the greater part of it. So, also, the buying and selling of uncurrent funds, and the exchanging of one kind of money for another, are equally the practice of the money-changer and the banker."

Sanders first cited this case in R. at 23.

> exchange and it includes the business of a banker and buying and selling of uncurrent funds and the exchanging of one kind of money for another.

R., Vol. 16, at 166; Vol. 19, at 8.

Sanders never denied he had filed no sales-tax returns. *See, e.g.*, R., Vol. 14, at 22. However, he raised numerous defenses:

A. Moneychanging is not taxable, because it involves exchanges of one form of money for another.[6] In particular, Sanders contended that:[7]

[6] **1.** He exchanged Federal Reserve Notes ("FRNs") for domestic or foreign legal-tender silver or gold coins, or silver bullion.

2. His "trade confirmations" defined his contracts with customers as exchanges in which he bought, and they sold, FRNs for silver or gold money.[8]

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[6] *See* Smith v. Department of Revenue, State of Florida, 378 So.2d 421 (Fla. App. 1979), *relied on by Sanders in* R. at 21.

[6] [7] *See* R. at 21-24; Vol. 6, at 1; Vol. 17, at 20; 287-88; Vol. 17, at 17; 368; Vol. 21, at 3-9.

[8] Copies of the trade confirmations and related documents involved in the transactions relevant to this appeal appear in R., Vol. 18, Exhibits 9, 11, 12, 17, 18, 29. A copy of a blank trade confirmation is attached to this AMENDED PETITION as Exhibit A.

3. Contracts specifying payments in particular coins or currencies (*i.e.*, so-called "gold-clause contracts") are lawful.[9]

4. All domestic silver and gold coins, and FRNs, are legal tender within the United States.[10]

5. Gold Krugerrands are legal tender in their country of origin (the Republic of South Africa).[11]

[7] 6. Bullion of the precious metals is also money.[12]

7. FRNs are "notes" (*i.e.*, paper currency redeemable in lawful money) and "obligations of the United States".[13]

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[9] 31 U.S.C. § 5118(d)(2). A " 'gold clause' means a provision in or related to an obligation" that "gives the obligee a right to require payment in * * * gold; * * * a particular United States coin or currency; or * * * United States money measured in gold or in a particular United States coin or currency". 31 U.S.C. § 5118(a)(1). *Compare* Willis v. Allison, 51 Tenn. 385, 394 (1871), *with* Bronson v. Rodes, 74 U.S. (7 Wall.) 229, 250 (1869), *and* Butler v. Horowitz, 74 U.S. (7 Wall.) 258, 260 (1869), *relied on by Sanders in* R., Vol. 19, at 36.

[10] *E.g.*, 31 U.S.C. §§ 5103, 5112(h). The Criminal Court so charged the jury. R., Vol. 16, at 165-66.

[11] *See* the exhibits attached in R. at 371-422, *received into the record at the argument on Sanders' motion for a new trial*, R., Vol. 21, at 4-7. The Criminal Court judicially noticed the foreign laws under Tenn. R. Ev. 202(b)(5). R. at 292; Vol. 21, at 3-6.

[12] In violation of federal law, the Criminal Court erroneously refused Sanders' requested jury-instruction that "gold and silver * * * bullion are money". R., Vol. 19, at 36; Vol. 16, at 149; Vol. 17, at 3, 6, 22. Later, Sanders reasserted this argument. R., Vol. 21, at 8.

[13] 12 U.S.C. § 411 (1989).

8. Under Tennessee law, " '[m]oney' means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency".[14]

9. Also under Tennessee law, a "dealer" is a person who "[s]ells at retail * * * tangible personal property"; but " '[tangible personal property' does not include * * * notes * * * or other obligations".[15] And,

10. Exchanges of money for money are not taxable.[16]

11. Therefore, Sanders claimed, he was not subject to sales tax when he bought FRNs for silver or gold, because he was exchanging one kind of money for another or was purchasing "notes" or "obligations" (FRNs) for gold or silver money.

12. By indicting him for failure to pay sales taxes on [8] moneychanging, Sanders argued, the State was attempting to declare that only FRNs are money within the United States, in violation: (i) of the Constitution of the United States;[17] (ii) of the monetary statutes of Congress (as construed by the Supreme Court)[18] and the

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[14] T.C.A. § 47-1-201(24) (1994 Supp.). The Criminal Court so charged the jury. *See* R., Vol. 17, at 20. *See also* Crutchfield v. Robins, Tingley & Co., 24 Tenn. 15, 17 (1844) ("[m]oney is a generic term, and covers everything which by consent is made to represent property, and passes as such currently from hand to hand, whether it be * * * the gold and silver of the world, or the paper of modern Europe and America").

[15] T.C.A. § 67-6-102(6, 28) (1994).

[16] The State conceded this. R., Vol. 12, at 133-34; Vol. 13, at 58-59.

[17] U.S. Const. art. I, § 8, cl. 5 (Congress shall have the power "To coin Money, [and] regulate the Value thereof"); art. I, § 10,

Supremacy Clause of the Constitution[19]; and (iii) of the law of Tennessee[20]. And when Sanders' moneychanging of domestic and foreign coins are excluded from the State's proof on these grounds, the exchanges of silver bullion (assuming *arguendo* they were taxable) sum to a value from which a tax in excess of the $5,000 charged in the indictment could not be due. For those reasons, he should have been acquitted. R. at 389-91; 291-93; Vol. 21, at 3-9.

B. Even were moneychanging taxable, Sanders contended, the heretofore unprecedented application of T.C.A. § 67-1-1440(d) denied him due process of law under *United States* v. *Mallas* and related cases.[21] In particular, Sanders argued –

1. He had a nonfrivolous theory that moneychanging is not taxable.

2. He found neither any *pre*-indictment reported cases of [9] prosecutions of moneychangers under

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cl. 1 ("No State shall * * * make any Thing but gold and silver Coin a Tender in Payment of Debts").

[18] *E.g.*, 31 U.S.C.A. §§ 5103, 5112(a, e, h) (1983 & 1994 Supp). *See* Thompson v. Butler, 95 U.S. 694, 696 (1878); Bronson v. Rodes, 74 U.S. (7 Wall.) 229, 252 (1869), *relied on by Sanders in* R., Vol. 19, at 36.

[19] U.S. Const. art. VI, cl. 2.

[20] T.C.A. § 47-1-201(24) (1994 Supp.).

[21] *E.g.*, United States v. Mallas, 762 F.2d 361 (4th Cir. 1985); United States v. Critzer, 498 F.2d 1160 (4th Cir. 1974); United States v. Dahlstrom, 713 F.2d 1423 (9th Cir. 1983). *See* R. at 87, 100, 286, 295-99; Vol. 21, at 11-14, 20, 32-34.

§ 67-1-1440(d), nor any applicable civil cases or administrative sales-tax decisions, and therefore lacked notice that those laws supposedly applied to him. Moreover, on its face § 67-1-1440(d) provides no notice that a moneychanger's failure to file sales-tax returns is criminal. R., Vol. 9, at 27; 94; 183-84.

3. In short, Sanders received no notice of a purported requirement to pay sales taxes – until the State's criminal investigation and indictment. *See* R. at 55, 183-84; Vol. 15, at 44-45.

4. Conversely, from the inception of its investigation, the State knew Sanders believed he was not subject to tax, "because he was buying * * * [FRNs] and paying for them in silver" or gold. R., Vol. 18, Exhibit 19, at 2; Vol. 12, at 15, 90, 95-96.[22] From 31 July 1986 (when State undercover agent Wade Smith first made an exchange with Sanders during which the latter stated he was not subject to tax), through 17 September 1986 (when Smith prepared an affidavit in support of a search warrant reciting Sanders' position on the sales-tax issue), to 19 September 1989 (the date of the indictment), the State knew that Sanders disputed the application of the sales tax to moneychanging, and (through Smith) engaged in exchanges with Sanders on that basis, yet never warned him of the State's contention that his position was supposedly not only wrong as a matter of tax-law but also a criminal violation. *See* R., Vol. 12, at 7-16, 90, 95-96, 124-30; Vol. 18, Exhibit 19.

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[22] On the effectiveness of this notice as to the State, *see* T.C.A. § 47-1-201(25-28) (1994 Supp.).

5. Although T.C.A. § 67-1-1440(d) reaches only felonious acts that "delay * * * the state * * * in the collection of any of its lawful revenue" and that "deprive the state of the realization of such revenue at the time it is lawfully entitled thereto", prior to the indictment the [10] State never established by means of any civil or administrative mechanism that it was "lawfully entitled" to any "revenue" from Sanders. R. at 73-82, 107, 113-20, 285, 288-91, 311-14, 316-17, 322-26; Vol. 9, at 3, 7-11; Vol. 19, at 38-47, *denied*, Vol. 16, at 149-54; Vol. 17, at 4. Indeed, no one ever established when (if it ever did) the State became "lawfully entitled" to tax "revenue" from him.[23]

6. And therefore, Sanders contended, the indictment should have been dismissed or his conviction set aside as a denial of due process under *Mallas* and related decisions, because "where the law is vague the defendant lacks the requisite intent to violate it", and "the state is required to proceed civilly in pioneering interpretations of any statute". R. at 86-87, 126, 296-99; Vol. 9, at 3, 7, 19-20; Vol. 21, at 11-14.

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[23] *E.g.*, at one *pre*-trial hearing, Sanders asked: "Could the state explain to me how we determine lawful entitlement?" The Criminal Court answered: "Well, we're not to get into that at this point. You certainly have a right to bring up anything you want to about that * * * or bring anything into the record on that that you would like and also to argue it to the jury." R., Vol. 9, at 17. Thus, although the court allowed Sanders to attempt to disprove "lawful entitlement", it never imposed on the State any burden to prove that element of its case. The closest the court came to grappling with this problem was its instruction to the jury on when "dealers" must file sales-tax returns. *See* R., Vol. 16, at 161.

The State produced no precedents applying the Tennessee sales tax to moneychangers. Instead, the State claimed that it was "under no duty to proceed civilly in the presence of a criminal violation" of T.C.A. § 67-1-1440(d), that "notice is not required under the criminal statute", and that Sanders "certainly has plenty of notice in the indictment". R. at 121, 122; Vol. 13, at 70, Vol. 9, at 26. Following Sanders' conviction, the State submitted a memorandum dealing with the unreported case of one Charles Powell, who entered a guilty plea in the Criminal [11] District Court to an indictment under § 67-1-1440(d) "[o]n May the 18th of 1990" – three and one-half years after the period charged in Sanders' indictment. R., Vol. 21, at 22; 268-70.

The Criminal Court expressed concern about lack of notice (although it allowed the case to go to the jury anyway).[24] R., Vol. 13, at 70-75; Vol. 14, at 2.

II. The trial in the Criminal Court.

At the trial, Sanders and the State put forward evidence that, rather than being diametrically opposed, was in major particulars identical or complementary.

A. Sanders' evidence.

1. Sanders testified that he did not become a moneychanger to amass wealth, but actually suffered large losses. R., Vol. 15, at 55-56. Rather, by about 1980 Sanders had

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[24] This highlights the nonfrivolous nature of Sanders' position.

> bec[o]me convinced that unless there was a change in * * * the United States monetary system, a change to some intrinsic value standard, * * * the monetary system, that is, the paper money system, would be destroyed. The banking and financial system would be destroyed, and I wanted to have something to do with reforming that.
>
> And so it was an interesting business to me to provide a service to people to exchange out of paper money and into gold and silver money * * * .

R., Vol. 14, at 12-13. *See* R., Vol. 15, at 55-56.

Sanders filed no sales-tax returns in Tennessee. R., Vol. 14, at 22. However, he asserted a good-faith belief and lack of any contrary notice that, as a moneychanger, he was not subject to sales tax. He recounted extensive research on economics, money, and law; reliance on experts; and inquiry into sales-tax law – and how these convinced him moneychanging is not taxable. R., Vol. 14, at 25-30, 35-57, 69-101; Vol. 15, at 9-14.

[12] Sanders explained his conclusion that, in addition to FRNs, "gold and silver coin is money under the laws of the State of Tennessee and the United States"; that

> legally in the United States we have a multiple monetary system, and that * * * both [FRNs] and gold and silver are money of the United States. Not only that, it's not just gold and silver coin, but gold and silver bullion, too, are money in the United States[;]

and that

> from an economic standpoint, it's just unquestionable that gold and silver are money. The central banks of the world hold them * * * as reserves; they're carried on the books of the banks as monetary assets. Debts are settled internationally in them.

R., Vol. 14, at 54, 90-91, 27.

Sanders also recounted his beliefs that "[y]ou're free to contract in the United States for anything you want in any form of money you want" and that "a contract to pay gold and silver is a contract to pay money". R., Vol. 15, at 42, 41. He testified that his trade confirmations provided

> all the explanation that I would normally have to make to a customer and what the terms and conditions of the exchange were. * * * I wanted the people I was dealing with to know exactly what we were doing with this trade. * * * My intent was to buy [FRNs] and pay for them in lawful gold and silver money, just like it says in Item No. 4 here [in the "trade confirmation"].

R., Vol. 15, at 18. The trade confirmations recite under "Terms & Conditions" that:

> - "[t]his writing is confirmation of our oral contract with you [*i.e.*, the customer]";
>
> - "[i]n any dispute the laws of the state of Tennessee shall govern"; and
>
> - "[r]egardless of whatever informal or customary language is used in trade, our business legally is buying notes and paying for them in gold and silver. Our acceptance of [FRNs] * * * in exchange for gold and silver

> money is a function of our common law 'moneychanging' * * * . We will exchange any form of money substitute such as [FRNs] or various foreign paper currencies, or other debt evidences or obligations for gold and silver money in its various forms".

[13] R., Vol. 18, Exhibit 29 (attached hereto as Exhibit A). More specifically, Sanders testified that his intent in the trades that constituted the State's case – namely, with Charles Batey, Don Webb, Jon Thompson, Bernard Verhaeghe, and Wade Smith[25] – was to conduct money-for-money exchanges, trading FRNs for silver or gold coins or bullion. R., Vol. 15, at 22-43 & Vol. 18, Exhibits 9, 11-12, 17-18. *See also* R., Vol. 15, at 96-98, 124.

Sanders explained his "understanding that- * * * there's no tax imposed on the exchange of money for money".

> I had studied the law * * * intensively for about two years, and I had become convinced from my study of the law and of economics that gold and silver were money, that these were money for money transactions and that no sales tax was due on any of these transactions.

R., Vol. 14, at 20-22.[26] He did not apply for a Tennessee "dealer's" license, Sanders testified, "[b]ecause I concluded from my study that I was not a person required to make that application. * * * I would be a moneychanger";

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[25] *See* Ct. Crim. App. Slip Opinion at 4 and the **TABLE OF EXCHANGES ADMITTED INTO EVIDENCE**, following page 20, *post*.

[26] *See also* R., Vol. 15, at 42, 43 ("the sales tax is a tax that is not levied on money"; "the sales tax is not a tax on money").

and that is "not an activity * * * subject to the sales tax". R., Vol. 15, at 15. Specifically, Sanders said, "my conclusion, after all the study of the law I had done, was that gold and silver bullion, gold and silver coins are not tangible personal property. They're money, and the sales tax * * * is not levied on money." "My conclusion from reading the law", Sanders explained,

> was that [the trade confirmations] were all contracts for the delivery of money. They were exchanges of money for money, whether they were bullion or whether they were coin; * * * and I concluded that since they were exchanges of money for money, they were not subject to the sales tax.

[14] R., Vol. 15, at 42, 98. *See* R., Vol. 14, at 45-47.

Relying on *United States* v. *Powell*[27], Sanders sought to introduce legal materials from which he had concluded that moneychanging is not taxable. But the Criminal Court excluded these materials. R., Vol. 14, at 49-54, 89-92; Vol. 15, at 9-13.

Sanders acknowledged a 1981 opinion of the Attorney General of Tennessee that "sales tax is applicable to the sale of of gold and silver bullion and coins", but disputed its effect: "it's just that, an opinion. It's not the law. It's not a regulation. It certainly can't override the statutes and the * * * Tennessee Supreme Court or the United States Supreme Court". Moreover, he did not even see the opinion until after the operative time-period in the indictment. R., Vol. 15, at 62-63, 98, 90. The Criminal

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[27] 955 F.2d 1206, 1213 (9th Cir. 1991), *applying* Cheek v. United States, 111 S. Ct. 604 (1991).

Court agreed with Sanders, charging the jury (without objection from the State) that an "opinion by the Attorney General * * * is not law" and "is not binding on * * * [Sanders]". R., Vol. 16, at 169; Vol. 19, at 15. In addition, the State conceded that the Attorney General's opinion "is not binding as case authority or as a statute". R., Vol. 17, at 2, 20.

Sanders also acknowledged that, before working as a moneychanger in Tennessee in late 1983, he did business in Arkansas, where he had "applied for a[] * * * sales tax permit" and "filed returns", and a civil judgment for taxes had been entered against him. He explained, however, that the returns filed there "showed all the transactions involving gold and silver as being exempt", "[b]ecause I thought and still think they were exchanges of money for money" and "weren't subject to * * * tax". R., Vol. 15, at 63; Vol. 14, at 102-04. Sanders sought an opinion from [15] the Attorney General of Arkansas, and from that State's Department of Finance and Administration, that moneychanging was exempt from sales tax, but received no answer. R., Vol. 15, at 108-10. Arkansas then used its administrative procedures to assess an alleged tax against him. R., Vol. 15, at 110-21.

After moving his moneychanging operation to Tennessee, Sanders "never received any notice" from that State informing him he "was required to file * * * returns", "no notification of any assessment", and "no lien" for taxes. R., Vol. 15, at 44-45, 120.

Finally, Sanders denied any intention to delay the collection of revenue or to deprive the State of the realization of revenue by not filing returns on moneychanging, because moneychanging is "not subject to the sales tax". R., Vol. 15, at 100, 124-25.

2. Sanders also offered the testimony of Dr. Edwin Vieira, Jr., whom the Criminal Court accepted as an expert on money. R., Vol. 16, at 76-76.[28] Sanders' expert testified that in today's economy "money" includes:

- "paper [currency] that has been created by a central bank or by a government treasury, such as * * * the [FRN]"; and
- silver and gold, which "may appear as monies as coin or as ingots or bars, sometimes called bullion", the form being insignificant as to the character of the metals as money. Indeed, "the bars [of gold and silver] are the ultimate form of money, the highest form of money in the system". Moreover, any differentiation between domestic and foreign coins or bars is unwarranted, as both are money in the State of Tennessee.

The expert-witness explained that a "dollar" is a coin containing 371.25 grains (troy) of fine silver, and that therefore silver bullion has a [16] value of 1.2929 dollars *per* ounce. R. Vol. 16, at 78-85, 103-04, 111-12.[29]

Sanders' expert also pointed out that the present-day disparity in purchasing power between FRNs, on the one hand, and silver and gold coin or bullion, on the other hand, results from the irredeemability of FRNs in silver or gold and the overissue of FRNs by the Federal Reserve System. But, the witness explained,

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[28] Sanders testified that this was one of the experts on whom he had relied in formulating his own conclusions. R., Vol. 14, at 28-30, 89-96.

[29] The witness recalled discussing this matter with Sanders. R., Vol. 16, at 110-11. Sanders' trade confirmations used this definition of the "dollar". *See* Exhibit A attached hereto.

> that doesn't mean that the paper [*i.e.*, FRNs] isn't money anymore. It's still money. And it doesn't mean that the silver coins are not money. It just means that one of these monies is better than another.[30]

As Gresham's Law predicts, he explained, people hold the more valuable of monies (gold and silver) and spend the less valuable (FRNs) – "and that's why when you go down to the supermarket you don't see people spending gold coins or silver coins". R., Vol. 16, at 85-90.

As to "gold-clause contracts", Sanders' expert testified that

- a gold-clause contract is "a contract in which you specify a particular kind of money to be used", such as "silver dollars" or "gold coin of the standard of 1900";
- gold-clause contracts are legitimate; and

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[30] When, for example, *more than* "$1" in FRNs must be exchanged for a "$1" silver coin in the marketplace (rather than "$1" for "$1"),

> [t]he reason the * * * nominal value, the number that's stamped on the coin or the number that printed on the paper, is not the same is because the paper has depreciated. * * * That doesn't mean that the two things aren't money. They're both money. It just means that one of those monies is worth less than the other money.

R., Vol. 16, at 97.

> • a contract for a hypothetical exchange of 1000 FRNs for a 100-ounce bar of silver "would specify that one party is exchanging or paying [17] so many [FRNs] for so many ounces of silver. The other party is paying or exchanging so many ounces of silver for that amount of [FRNs], and if you look at it from one direction it would be a monetary transaction. If you looked at it from the other direction, it would be a monetary transaction, because there are monies on both sides. * * * It would be a double gold-clause contract, because it would specify both sides as money".

R., Vol. 16, at 91-92, 98-99. The expert recalled discussing with Sanders how foreign gold and silver coins could be employed as money in the United States. R., Vol. 16, at 112-13. The expert-witness testified that Sanders' trade confirmation is

> designed to specify the kind of money that will be used in these * * * trades. He's got a whole specification on the back here of different types of coin, and on the front for the silver transactions * * * specifies that the standard will be the silver dollar of 371 and a quarter grains, and for the gold transactions, the standard will be the 23.22 grains of gold.
>
> So this is a gold clause type instrument * * * . It deals with a gold-clause type trade, depending on whether the trade is done in silver or gold. He has two standards here, depending on whether silver or gold is involved in the transaction. And he has a standard, too, for paper money * * * . There are three standards built into this, the gold, the silver, and the paper money standards.

The witness concluded that all the trade confirmations were gold-clause contracts for exchanges of money -- including silver bars, United States silver coins, and gold Krugerrands for FRNs. R., Vol. 17, at 94-95, 100-02, 143.

Sanders' expert also made clear that, even if one of Sanders' customers thought that he was purchasing gold or silver from, but not simultaneously selling FRNs to, Sanders, that exchange would nevertheless be "an exchange of money for money, no matter what [the customer] said". R., Vol. 16, at 130-33.

B. The State's evidence.

The State's case largely supported Sanders on the facts, but advanced a different interpretation of them.

1. On four key points, the testimony of the State's witnesses was [18] consistent with Sanders' evidence.

a. Revenue agent Wade Smith conceded that exchanges of FRNs for FRNs, and of FRNs for United States base-metallic coins, are not taxable. R., Vol. 12, at 133-34. And agent Owen Wheeler conceded that gold and silver coins "used as money" are not "tangible personal property", but opined that "if you hold it for an investment or for collection purposes, it is tangible personal property". R., Vol. 13, at 58-59. Wheeler did not define what "an investment * * * purpose[]" was, however. The State proferred no evidence that any of Sanders' customers acquired gold or silver for "collection purposes". And no State witness ever claimed that exchanges of gold and silver coins were subject to sales tax simply because the coins were exchanged for the "tangible values" or the "intrinsic values" of the precious metals they contained, as measured in FRNs, and not for their legal-tender face-values in "dollars".[31]

b. Smith conceded that the trade confirmations for his exchanges with Sanders recite that he sold FRNs to Sanders for silver bars. Moreover, Smith admitted that, while posing as a customer, he never objected to the terms of the confirmations. In addition, asked whether he "agree[d] * * * that [Sanders'] intent was to buy" FRNs, he answered: "His Confirmation says that he's buying [FRNs]". R., Vol. 12, at 11-12, 50-56, 85, 87, 89-90, 95, 125-31.

c. Smith also admitted that, while he posed as a customer, Sanders [19] had explained to him that "there was no sales tax due [on the exchanges] because he [Sanders] was buying my [FRNs], and there would be no tax due on that", and "because he was buying my [FRNs] and paying for them in silver, which he claims is a legal tender * * * for the transaction". R., Vol. 12, at 15, 90.[32] Although Smith tried to put an inculpatory gloss on

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[31] Neither through a witness or by way of legal argument did the State ever support Wheeler's theory that holding some form of money for "investment * * * purposes" renders it *not* "money". The State never explained why United States gold and silver coins are not always "used as money" or deemed to be "money" perforce of the legal-tender law. 31 U.S.C. §§ 5103, 5112(h). Neither did the State ever explain why legal-tender Krugerrands are not always used or deemed to be "money" under Tennessee's own law. *See* T.C.A. § 47-1-201(24) (1992).

[32] Smith had also stated this in his affidavit in support of a warrant for a search of Sanders' office. R., Vol. 12, at 95-96. *See* R., Vol. 18, Exhibit 19.

Sanders' theory,[33] the State introduced no evidence that Sanders had ever expressed a contrary intent.[34]

d. Its witnesses also admitted that the State gave Sanders no *pre*-indictment notice that it objected to the terms of his trade confirmations as allegedly inconsistent with supposed sales-tax obligations, that Sanders was subject to sales tax as a moneychanger, that he was being assessed for sales taxes, that he had an alleged tax deficiency, or in any other way. R., Vol. 12, at 53-56, 70, 128, 130-31, 135-36, 138; Vol. 13, at 38-39, 54.

2. The State's case diverged from Sanders' in three particulars.

a. The State tried to impugn as simply an "artifice, design, * * * [or] strategem" prohibited by T.C.A. § 67-1-1440(d) Sanders' claim that he bought FRNs for gold or silver money, on the basis of a letter Sanders had written. Sanders wrote that,

> [a]s to the good sales tax people in Tennessee, I am no longer selling anything. Relying on the definition of [FRNs] at 12 USC 411, I am buying "obligations" and paying for them in lawful gold [20] and silver money. This makes my

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[33] *See post*, at 20.

[34] The only other witness (besides Sanders himself) who testified with respect to Sanders' intent was *bona fide* customer Charles Batey. Asked whether he (Batey) had "ask[ed Sanders] * * * if he had an intent otherwise than what was expressed in the written agreement", Batey responded: "No. Because I didn't pay any attention to the way it was written up." R., Vol. 11, at 171.

> invoices a bit hard to explain to my customers, but I think it will keep the State of Tennessee at bay.

Agent Smith attempted to "interpret" Sanders' thoughts: "In reading the whole letter, we felt that kind of set up the fact that he was aware that sales tax was due; that sales tax was owing." But the Criminal Court sustained Sanders' objection to this psychologizing (although it allowed the letter to be introduced into evidence). R., Vol. 12, at 102-09 & Exhibit 21. And nowhere did the State proffer any evidence that Sanders was not honestly "[r]elying on the definition of [FRNs] at 12 USC 411".[35]

b. The State tried to show that Sanders had no intent to buy FRNs, because (notwithstanding the trade confirmations, and unknown to him) his customers supposedly had no intent to sell FRNs. The Criminal Court limited the State to exchanges with five customers. R., Vol. 13, at 12-33, 46-51. The **TABLE OF EXCHANGES ADMITTED INTO EVIDENCE** (next page) summarizes these exchanges. Customers Batey, Webb, and Thompson testified over Sanders' objection that they had not intended to sell FRNs to Sanders when they exchanged those FRNs with him for gold or silver.[36]

(1) Charles Batey was asked whether "there was any discussion about trading [FRNs] for the coins" or whether "that ever [was his] intent", and answered that "it certainly wasn't", "I was there to buy silver or gold". But Batey explained neither how he "bought" coins without trading FRNs for them, nor why it was not his intent to do what in fact he did. Again, asked if it was "ever [his] intention * * * to sell [FRNs] to [21] [Sanders]", Batey responded: "I couldn't sell them to him if I was buying silver". Batey did not deny, however, that he exchanged FRNs for the silver he "was buying". Pressed on cross-examination if he "ask[ed Sanders] * * * if [Sanders] had an intent otherwise than what was expressed in the written agreement", Batey conceded: "No. Because I didn't pay any attention to the way it was written up." R., Vol. 11, at 138, 150-51, 171.

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[35] As a matter of law, not such evidence would be probative, because FRNs "shall be obligations of the United States". 12 U.S.C. § 411.

[36] Bernard Verhaeghe did not testify. And the Criminal Court sustained Sanders' objection to the "intent" testimony of Wade Smith. R., Vol. 12, at 87.

TABLE OF EXCHANGES ADMITTED INTO EVIDENCE[1]

Customer	Customer Received[2]	Customer Exchanged (FRNs)	Tax Rate (%)	Alleged Tax Due (FRNs)
Batey	**U.S. 40% SILVER COINS**	5,000.23	6.75	337.52
Batey	**SOUTH AFRICAN KRUGERRANDS**	8,020.00	7.75	621.55
Batey	1-oz silver rounds	510.00	7.75	39.53
Batey	100-oz silver bars	2,430.00	7.75	188.33
Batey	100-oz silver bars	2,322.00	7.75	179.96
Webb	**U.S. "OLYMPIC" GOLD COINS**	11,562.80	6.75	780.49
Webb	**U.S. "OLYMPIC" GOLD COINS**	7,904.00	7.75	612.56
Webb	**U.S. "OLYMPIC" GOLD COINS**	26,437.50	7.75	2,048.91
Thompson	100-oz silver bars	6,000.00	7.75	465.00
Thompson	100-oz silver bars	6,000.00	7.75	465.00
Verhaeghe	**SOUTH AFRICAN KRUGERRANDS**	864,078.06	7.75	66,966.05
Smith	100-oz silver bars	3,432.00	7.75	265.98
Smith	100-oz silver bars	1,914.00	7.75	148.34
			TOTAL:	73,119.20

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[1] *See* Ct. Crim. App. Slip Op. at 4

[2] Coins in **ALL CAPITALS AND BOLD FACE** are legal tender in their countries of origin. United States 40% silver coins are legal tender under 31 U.S.C.A. § 5103 (1983). United States "Olympic" gold coins are legal tender under § 2(d) of the Act of 22 July 1982, Pub.L. 97-220, 96 Stat. 222, 222. Krugerrands are legal tender under the laws of South Africa. *See* R. at 371-422, *received into the record in* Vol. 21, at 3-6.

(2) Don Webb simply answered "[n]o" when asked whether he "plan[ned] on selling [Sanders] anything" – but acknowledged that he paid for the coins he acquired. R., Vol. 11, at 181, 174-75.

(3) Jon Thompson also simply said "[n]o" when asked whether "there [was] ever any intent on [his] part * * * to sell" FRNs to Sanders, although he too paid for the bullion he received. R., Vol. 11, at 187.

With the first question the State posed to Batey as to Batey's intent, Sanders objected that the parole-evidence rule[37] precluded the State from "attempting to * * * impeach the expressed written terms of the contract". The State responded that

> this directly goes to show [Sanders'] deceptiveness in that he is putting on a voucher with a customer that, "You have sold five thousand dollars and thirty-three cents worth of [FRNs]."
>
> Mr. Batey's intent of going in there to buy silver * * * is very important. [Sanders] says that he was making exchanges, paper money for coin. You've got to have the other side. The other side is saying, no, we didn't. That goes to [Sanders'] intent and what we submit is subterfuge.
>
> * * *
>
> What [Mr. Batey] intended to do is very, very important, and obviously he did not intend this [*i.e.*, to sell FRNs]. * * * Mr. Batey went in to buy silver * * *. This [*i.e.*, a trade confirmation] is what he was given. This isn't what he agreed

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[37] *See* T.C.A. §§ 47-2-201 and 47-2-202 (1992).

> to do. * * * What they make out of this is up to the jury * * * . But they need to hear what was in the mind of the customer when he went in there * * * .

The Criminal Court allowed the questioning, because "the jury's already [22] looked at" the trade confirmation, but granted Sanders an "[o]ngoing standard objection". R., Vol. 11, at 141-45. The State introduced no evidence that any customer ever communicated to Sanders an intent different from what the trade confirmations indicated.

Sanders requested jury-instructions on the parole-evidence rule, which the Criminal Court denied. R., Vol. 19, at 48-49; Vol. 16, at 154; Vol. 17, at 4, 6. Sanders later renewed his objection. R. at 313; 332-35; Vol. 21, at 16-18. Sanders also moved for judgment of acquittal on the ground that, had his customers not intended to sell FRNs to him, the trade confirmations "were not contracts"; and "there's no sales tax due if there wasn't a meeting of the minds". The Criminal Court denied this motion. R., Vol. 17, at 17-18; *see* R. at 316-17; Vol. 21, at 20. These denials were highlighted when the court denied Sanders' motion for a new trial, saying that "the jury apparently determined that [Sanders] was not exchanging money as he claimed but was buying and selling collectors coins for the purpose of investment and profit". R. at 361. Thus, the court licensed the jury to impute to Sanders his customers' secret intent, in contradiction of the explicit terms of the written trade confirmations that the customers had received without complaint.

c. As noted above, revenue agent Wheeler opined that exchanges of FRNs for silver and gold coins are taxable "if you hold it for an investment"; and the Criminal Court speculated that the jury had accepted the State's theory that Sanders was selling coins "for the purpose of investment and profit". The State, however, introduced next to no testimony that the customers had an "investment" intent.

(1) Charles Batey simply answered "Yes" when asked whether he was "involved in investing in gold coins, silver coins, bullion" -- and nothing more was said on that subject. R., Vol. 11, at 136. Batey never stated [23] that he had an "investment" intent with respect to any of his five specific transactions.

(2) Don Webb testified that he acquired coins as "promotional gifts" for company personnel. R., Vol. 11, at 173-74, 181, 182. He never suggested that his exchanges had any "investment" motive.

(3) Jon Thompson was not asked why he had acquired silver bullion. Apparently, he gave some of the silver to his children. *See* R., Vol. 11, at 187, 192. But he did not explain his purpose in doing so.

(4) Bernard Verhaeghe did not testify. Sanders testified that, to his knowledge, the purpose of Verhaeghe's exchanges was to "bring[ ] money back into the [United States from Switzerland]" for some third party for whom Verhaeghe was interceding. R., Vol. 15, at 31-38. Sanders did not suggest that Verhaeghe had acted with any "investment" intent; rather, the exchanges were purely monetary: moving purchasing-power across national borders.

(5) Undercover agent Wade Smith's intent was only to discover if Sanders was paying sales tax. After acquiring the bullion, Smith "sold [it] to someone in that business that replenished the money that I'd gotten from the State to make that buy". R., Vol. 12, at 82-91.

C. Jury instructions, verdict, and sentence.

1. At the close of the evidence, the Criminal Court instructed the jury on the terms "intentionally",[38] "knowingly",[39] and "design".[40] But [24] the court gave no instruction on the term "feloniously" (the term used in the indictment), and denied Sanders' requested instructions on the terms "felonious intent"[41] and "wilfully",[42] on the ground that "a general instruction" would cover these matters. R., Vol. 16, at 155. The court also denied Sanders' instructions on his defense of good faith. *Id.* And the court's instructions did not explain that purposeful violation of the law was an element under T.C.A. § 67-1-1440(d).[43]

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[38] "Intentionally means doing an act by design or purpose, a determination to act in a certain way or to do a certain thing." R., Vol. 16, at 162; Vol. 19, at 7.

[39] "Knowingly means with knowledge; and in a criminal proceeding means that the defendant knew what he was about to do, and, with such knowledge, proceeded to do the act charged." R., Vol. 16, at 162-63; Vol. 19, at 7.

[40] "Design means to form plan or scheme of, conceive and arrange in mind, originate mentally, plan out, contrive. Also, the plan or scheme conceived in mind and intended for subsequent execution, preliminary conception of idea to be carried into effect by action, contrivance in accordance with preconceived plan." R., Vol. 16, at 165; Vol. 19, at 8.

[41] "[F]elonious intent" means "that intent on the part of the Defendant which is meant to be a deliberate and wilfull attempt to violate the law, with knowledge of the duties imposed upon him by law". R., Vol. 19, at 51.

[42] "An act is done 'wilfully' if done voluntarily and intentionally, and with the specific intent to do[] something the law forbids * * * ." R., Vol. 19, at 52.

Also, the court did not instruct the jury, and the State did not request an instruction, that all of Sanders' exchanges of silver and gold coins were taxable simply because the face-values of the FRNs exchanged for the coins were greater than the face-values of the coins themselves (*i.e.*, that the coins and the FRNs did not exchange on a nominal "dollar-for-dollar" basis).

2. The jury convicted Sanders on both counts of "failing to file monthly sales tax returns as charged", but assessed no fine. R., Vol. 17, at 35. The jury was not instructed to and did not determine the amount [25] of tax Sanders supposedly owed, other than (implicitly) that it "exceed[ed] five thousand dollars", as the indictment alleged.

3. The Criminal Court sentenced Sanders to one year of imprisonment on each count, the sentences to be served concurrently but "suspended except for * * * thirty days confinement". The court also ordered restitution of $73,000, "paid out at $1000.00 per month with a probation

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[43] *See* Cheek v. United States, 111 S. Ct. 604, 610 (1991): "Willfullness" in the context of criminal tax cases is usually defined as a "voluntary, intentional violation of a known legal duty".

of six years", together with "1000 hours community service". The restitution reflected what the State argued was "[t]he proof * * * in the record as to the amount of taxes owed". This "proof" consisted of revenue agent Wheeler's calculation of taxes owed on all the exchanges between Sanders and Batey, Webb, Thompson, Verhaeghe, and Smith. R., Vol. 20, at 36-37, 33; Vol. 13, at 47-51. *See* **TABLE OF EXCHANGES ADMITTED INTO EVIDENCE**.

III. *Post*-trial proceedings in the Criminal Court.

After Sanders' conviction, the Criminal Court received into the record documents establishing that Krugerrands are legal tender in South Africa. R. at 317-422, *received into the record in* Vol. 21, at 3-6.[44]

Then, on his motions under Tennessee Rules of Criminal Procedure 29 and 33, Sanders and the State focussed on the issues that were to be raised on appeal, first to the Tennessee Court of Criminal Appeals and then to the Tennessee Supreme Court:

A. 1. *Due process of law under* Mallas *and related cases.* Sanders argued that this case is "one of first impression in * * * Tennessee", "involv[ing] the very unique issue of whether [his moneychanging] transactions * * * were in fact taxable". Because there are at least three reasonable constructions of the law – Sanders', the State's, and the Criminal Court's – "there's an inherent due process violation" in [26] prosecuting Sanders. R.,

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[44] This was proper under Tenn. R. Ev. 202(b)(5).

Vol. 21, at 4, 11-13; *see also* R. at 286, 296-300, 310-11, 317, 326. The State disagreed. R., Vol. 21, at 21-22, 29, 32.

2. *Money-for-money exchanges.* Sanders argued that, as a matter of federal constitutional and statutory law, silver and gold coins and bullion are money; and that exchanges of FRNs for them are nontaxable money-for-money trades. R., Vol. 21, at 4-9, 34-35; 285-86, 291-96, 335-53. The State disagreed. R., Vol. 21, at 29. Sanders also argued that the Criminal Court erred in denying his requested jury-instruction that the "sales tax law does not tax money itself and gold and silver coin and bullion are money". R. at 311, 317, 332-35; *see* R., Vol. 16, at 149.

3. *The State's failure to prove $5,000 in tax owed.* Sanders further argued that, even "[i]f the silver bullion could be taxed, there wouldn't be five thousand dollars * * * due and payable. So * * * the prosecution * * * failed in their proof". R., Vol. 21, at 4-9; *see also* R. at 293, 317. Once more, the State disagreed:

> With regard to all of the bullion, the silver, the Krugerrands, the gold that was sold, * * * every one of [the witnesses] who testified said that they bought it for investment purposes. They were not using it * * * as a medium of exchange in any way. * * * It's not a medium of exchange. * * * [T]he jury did not buy it * * * .

R., Vol. 21, at 29. This was hyperbole; for *not* "every one of [the witnesses]" – but only, perhaps, Batey – so testified.[45] And the State never asserted the theory that the exchanges of silver and gold coins were taxable simply because the face-values of the FRNs exchanged for the coins were greater than the face-values of the coins themselves (*i.e.*, that the coins and the FRNs did not exchange on a nominal "dollar-for-dollar" basis). So Samders did not object to the State's failure to offer [27] proof supporting such a theory. (As explained *post*, this "intrinsic-value" theory arose only on appeal.)

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[45] *See ante*, at 22-23.

4. *Sanders' defenses sounding in "good faith"*. **a.** Sanders again objected to the Criminal Court's denial of jury-instructions on the parole-evidence rule. R. at 313, 332-35; *see* R., Vol. 16, at 154. The State reiterated its theory that Sanders

> had the receipts [*i.e.*, the trade confirmations] that the witnesses testified that they didn't know what these things were. They were all backwards. * * * And we submit that, as the jury found, this was how [Sanders] intended to do it, to so bamboozle the ordinary state tax people * * * that they wouldn't catch him in his business.

R., Vol. 21, at 27-28; *see also* R., Vol. 13, at 69-70.

b. Sanders further argued that the Criminal Court erred in excluding the documentary materials on which he had relied in forming his belief that moneychanging is not taxable. R., Vol. 21, at 17-18; *see also* R. at 320, 327-32.

c. Sanders also objected to the Criminal Court's denial of his requested jury-instructions on "willfulness": "[W]e've argued from the outset that there has to be that evil mens rea, * * * some critical intent that's involved in this case". R. at 313-15, 332-35; Vol. 21, at 16-17. The State agreed that "[t]his is an intentional crime dealing with willful and intentional, a felonious intent"; "[t]he criminal intent was unlawfully, willfully and feloniously", but simultaneously argued that "[u]nder [T.C.A. § 67-1-144(d)] there is no 'good faith' escape hatch". R., Vol. 21, at 27, 31, 26.

5. *Restitution.* Finally, Sanders objected to the Criminal Court's conditioning of probation on payment of restitution of $73,000 of tax alleged owed. R., Vol. 21, at 19; Vol. 20, at 29-32. The State countered that restitution restitution could be in addition to "the entire amount of civil liability" discovered, and that "the Criminal Court can impose [28] restitution, as much, in any way the Court wants to". R., Vol. 21, at 22-23, 31.

B. The Criminal Court denied Sanders' Tennessee Rule 29 and 33 motions. R. at 361-63.

1. On the issue of due process under the *Mallas* cases, the court said nothing.

2. On the issue of money-for-money exchanges, the court opined that

> it does not matter whether England, Canada, or South Africa recognize the Krugerrand as money, legal tender, or currency. The only defense along these lines is that the United States of America recognizes the Krugerrand and other coins involved in this case as legal tender.

The court did not explain how the sales tax can reach Krugerrands when Tennessee law recognizes them as money, because they have been "authorized or adopted by a domestic *or foreign government* as a part of its currency".[46] Neither did the court explain how exchanges of legal-tender United States gold and silver coins can be taxable, when the court itself acknowledged as a defense that "the United States * * * recognizes * * * [those] coins * * * as legal tender".

3. On the issue of the State's failure to prove more than $5,000 in taxes allegedly owed, the court said nothing.

4. On the issue of Sanders' defenses sounding in "good faith", the court agreed that "merely failure to file is not a crime", but concluded that Sanders "had a clear purpose in avoiding the payment of taxes", and that "[t]he jury was correct in its apparent determination that [Sanders] did more than 'merely' fail to file".

5. On the issue of restitution, the court noted that "[t]he State * * * is the victim * * * and restitution is clearly proper since the damage caused to the state was the delay and deprivation of lawful [29] revenue". The court did not explain why the *amount* of restitution it ordered was proper.

And the court overruled all of Sanders' objections to its denial of his requested jury-instructions, on the ground that "the instructions given the jury were accurate and covered all issues material to the finding of guilt or innocence".

At no point did the court say, or even suggest, that Sanders' exchanges of silver and gold coins were taxable simply because the face-values of the FRNs exchanged for the coins were greater than the face-values of the coins themselves (*i.e.*, because the coins and the FRNs did not exchange on a nominal "dollar-for-dollar" basis).

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[46] T.C.A. § 47-1-201(24) (1994 Supp.) (emphasis supplied).

IV. The appeal to the Court of Criminal Appeals.

Sanders appealed. The Court of Criminal Appeals reversed his conviction on the first count of the indictment on the ground of double jeopardy. Ct. Crim. App. Slip Op. at 20-22. But it affirmed his conviction on the second count, rejecting all his arguments.

A. The court recognized that Sanders' "due process/fair notice claim is * * * rather complex", and correctly stated his contention that *United States* v. *Mallas* and cognate cases[47] applied because

> the issue of [Sanders'] tax liability is 'vague and highly debatable,' and * * * the traditional sources of notice (civil, administrative, and criminal precedent) are silent and therefore ambiguous on the subject of tax liability for his conduct.

Nevertheless, the court denied that the *Mallas* cases compelled reversal, because those cases are supposedly "distinguishable from the case at bar". Ct. Crim. App. Slip Op. at 4-6.

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[47] United States v. Mallas, 762 F.2d 361 (4th Cir. 1985); United States v. Harris, 942 F.2d 1125 (7th Cir. 1991); United States v. Dahlstrom, 713 F.2d 1423 (9th Cir. 1983); United States v. Garber, 607 F.2d 92 (5th Cir. 1979); *and* United States v. Critzer, 498 F.2d 1160 (4th Cir. 1974), *cited in* Ct. Crim. App. Slip Op. at 4-5 & n.1.

[30] 1. In *Critzer,* the Court of Criminal Appeals opined, " 'the government [was] in dispute with itself as to whether the * * * income was taxable' ", and that a government agent had advised Critzer that "she was not subject to taxation". Whereas, here, Sanders "was never advised that his transaction were not subject to * * * sales tax"; and "[i]n 1981, the Office of Attorney General of Tennessee issued an opinion which stated that the sale of gold and silver coins and bullion is subject to state sales tax". Ct. Crim. App. Slip Op. at 6 & n.2, *citing* 10 Op. Att'y Gen. 967 (1981).

2. In *Harris,* the Court of Criminal Appeals argued, "the closest authority actually favored Harris' position that she did not receive income which was subject to taxation". Whereas, here, "the 1981 opinion of the * * * Attorney General is the closest position of authority on the issue * * * and this opinion clearly states that these transactions are indeed subject to taxation". Ct. Crim. App. Slip Op. at 6.

3. Both *Mallas* and *Dalhstrom,* the Court of Criminal Appeals contended, "involved unique and complicated tax shelter programs". Whereas, here, "the sale of gold and silver coins and bullion is not nearly as complicated", "nor are the provisions of the Tennessee Code pertaining to sales tax as complex as the Internal Revenue Code". "The plain meaning of these statutory provisions", the court said, "is not * * * so vague and ambiguous as to lead one to believe that the sale of gold and silver coins and bullion is not subject to sales tax". Ct. Crim. App. Slip Op. at 7-8.

The court then pointed out that *Mallas* "conceded that 'a duty not articulated by regulatory language or judicial construction may nonetheless be compelled by the authoritative force of common sense' ", and that " 'due process does not require the prosecution to cite a [31] litigated fact pattern directly on point' ". The court then quoted *United States* v. *Ingredient Technology Corp.*[48] for the conclusion that a law satisfies due process if it does " 'not lull the potential defendant into a false sense of security, giving him *no reason even to suspect that his conduct might be within its scope*' ". Ct. Crim. App. Slip Op. at 8.

4. The Court of Criminal Appeals then ruled that there was evidence sufficient for the jury to find, without a violation of due process of law, that Sanders did not have a subjective good-faith belief that exchanges of silver and gold coins and silver bullion for FRNs are not subject to sales tax. Ct. Crim. App. Slip Op. at 8-11. This supposed evidence consisted of

- "a judgment for the state of Arkansas against [Sanders] for sales tax due on the sale of gold and silver coins and bullion" in Arkansas;
- an advertisement Sanders had placed in a Tennessee newspaper while he was "engaged in the business of selling gold and silver coins and bullion in * * * Arkansas", which stated that "[i]f you're a Memphis buyer, you save six percent sales tax on any purchase mailed to Tennessee"; and

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[48] 698 F.2d 88, 96 (2d Cir. 1983).

- a letter in which Sanders wrote that "[a]s to the good sales tax people in Tennessee, I am no longer selling anything. Relying on the definition of Federal Reserve Notes at 12 USC 411, I am uying 'obligations' and paying for them in lawful gold and silver money. This makes my invoices a bit hard to explain to my customers, but I think it will keep the State of Tennessee at bay".

Ct. Crim. App. Slip Op. at 9.[49]

B. 1. The Court of Criminal Appeals then addressed Sanders' argument that "exchanges of federal reserve notes for gold and silver coins and bullion are nontaxable exchanges of money for money", because

[32] • under federal statutes,[50] "domestic gold and silver coins are 'money' in the same legal sense as federal reserve notes";

- under Tennessee statute,[51] gold Krugerrands are "money";

- under *Bronson* v. *Rodes*[52], "silver bullion is 'money' in and of itself";

- "all of the transactions at issue in this case in-volve[d] exchanges of money for money" (*i.e.*,

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[49] For the Court of Criminal Appeals to include this issue in its discussion of the *Mallas* line of cases was inapposite. For if the law is ambiguous, the subjective intent of a defendant, and a jury's finding as to that intent, are irrelevant. *See post*, at 42.

[50] 31 U.S.C. §§ 5103, 5112(h).

[51] T.C.A. § 47-1-201(24) (1994 Supp.).

[52] 74 U.S. (7 Wall.) 229, 249-50 (1869).

> FRNs for gold coins, silver coins, or silver bullion); and
>
> - "the State has conceded that exchanges of money for money are not taxable".

The court rejected this argument, however, by "look[ing] beyond the contested, varying surface meaning of terms such as 'money,' 'legal tender,' and 'medium of exchange' ", and "delv[ing] into the * * * economic substance, of the transactions at issue". Ct. Crim. App. Slip Op. at 11-12. Citing decisions of courts in other States that "the question of taxability turns on 'whether the coins were purchased for their tangible value, the value of the precious metal; or for their intangible value as a medium of exchange, the value established irrespective of the value given the precious metal' ", the court ruled that

> in each of the transactions involved in this case, [Sanders'] own 'trade confirmations' valued the gold and silver coins and bullion according to their precious metal content. In con-trast, the record contains no conclusive evidence that any of [Sanders'] customers purchased the coins or bullion for use as currency, irrespective of their intrinsic value. We find that because the coins and bullion involved were sold according to their intrinsic value, they properly fall within the meaning of "tangible personal property," and their sale is therefore subject to state sales tax * * * .

Ct. Crim. App. Slip Op. at 12-13. The court did not refer to any point in the record at which the State argued or the trial court ruled or [33] instructed the jury that Sanders' exchanges were taxable simply because the " 'trade confirmations' valued the gold and silver coins and bullion according to their precious metal content", or because "the coins and bullion involved were sold according to their intrinsic value".[53]

2. Rejecting Sanders' argument that "if the exchange of federal reserve notes for gold and silver coins and bullion is * * * subject to taxation, then the Tennessee sales tax unconstitutionally * * * interferes with the exercise of Congress' monetary power", the Court of Criminal Appeals adopted the reasoning of *Switchman's Coin Shop, Inc.* v. *Administrative Hearing Commission*[54], that

> [i]mposition of sales tax on the sale of these coins does not impinge upon the exclusive right of the federal government to regulate the value of money, coin money, or determine the character of legal tender. . . . The tax imposed on these transactions was based on the value of the precious metal; not the intangible value assigned the coins by the federal government. Common sense dictates this regulation has nothing to do with the coining of money or the regulation of its value.

Ct. Crim. App. Slip Op. at 13.

C. The Court of Criminal Appeals then rejected Sanders' argument that

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[53] At trial, the State conceded that gold and silver coins "used as money" are not "tangible personal property" exchanges of which are subject to sales tax, and argued only the proposition that "if you hold it for an *investment* or for *collection purposes,* it is tangible personal property". R., Vol. 13, at 58-59 (emphasis supplied).

[54] 654 S.W.2d 873, 876 (Mo. 1983).

> the only transactions which could possible be subject to taxation are the sales of bullion and two (2) sales of coins which, according to the testimony, were for "investment" purposes. Although [Sanders'] assertion that these sales do not render a sales tax in excess of five thousand dollars ($5000) is correct, [Sanders] erroneously assumes that these sales are the only taxable transactions. In fact, * * * we found that all of the transactions * * * are subject to sales tax, not just the ones involving bullion and coins admittedly acquired for "investment purposes".

[34] Ct. Crim. App. Slip Op. at 14. Thus, the court ruled that, although an "investment purpose" for an exchange of FRNs for gold or silver coins is sufficient to render the transaction taxable, such a purpose is not necessary. Rather, that the value of the coins as measured in FRNs exceeds their face-values is by itself enough for such exchanges to be taxable. But, again, the court referred to no point in the record at which the State argued or the trial court ruled or instructed the jury that Sanders' exchanges were taxable simply because the " 'trade confirmations' valued the gold and silver coins and bullion according to their precious metal content", or because "the coins and bullion involved were sold according to their intrinsic value".

D. 1. The Court of Criminal Appeals correctly stated Sanders' argument that

> the trial court improperly allowed three (3) of [Sanders'] customers to testify that they had not intended to sell [Sanders] federal reserve notes in exchange for gold or silver coins or bullion,

> even though language in [Sanders'] "trade confirmations" indicates that buying federal reserve notes was [Sanders'] intent.

But the court found that the parole-evidence rule did not preclude admission of the testimony, because the trade confirmations "were actually receipts rather than contracts", and mere " 'written confirmation of [Sanders'] *oral contracts* with his customers' ". In addition, said the court, the trade confirmations

> were entered into evidence, and [Sanders] also testified * * * as to his intent regarding these exchanges. Since there was ample evidence concerning [Sanders'] intent regarding the *oral contacts* for the exchange of federal reserve notes for gold or silver coins or bullion, we do not believe that it was er-ror for the trial court to allow the customers to testify as to their intent with regard to the same transactions.

Ct. Crim. App. Slip Op. at 14-15.

The court acknowledged Sanders' argument that allowance of the customers' testimony deprived him of due process of law, by [35] " 'misle[ading] the jury into thinking that [the defendant] intended what his customers did,' " and "thereby striking at the heart of his good faith defense that he did not believe the exchanges * * * to be subject to taxation". However, the court found

> no reason to suspect that the jury imputed the customers' intent to [Sanders]. Instead, it appears that the jury con-sidered [Sanders'] testimony and the trade confirmations as an expression of [Sanders'] intent, and the customers' testi-mony as an expression of their own

> personal intent. Thus, even if the allowance of the customers' testimony * * * was error, * * * such an error was harmless beyond a doubt because there is nothing in the record which suggests that the jury considered the customers' testimony as bearing on the sincer-ity of [Sanders'] stated belief that the transactions * * * were not taxable.

Ct. Crim. App. Slip Op. at 15-16.

2. The Court of Criminal Appeals also acknowledged both (i) Sanders' argument that "the trial court erroneously refused to allow into evidence legal materials upon which [Sanders] relied in forming his belief that the transactions at issue were not subject to sales tax", and (ii) the holding of *United States* v. *Powell*[55] that, in tax-evasion cases, "statutes or case law upon which the defendant claims to have *actually relied* are admissible", and a trial court "ordinarily cannot exclude" such evidence. However, the court ruled that Sanders' case

> is far from ordinary. * * * [T]he probative value of entering these materials into evidence was substantially outweighed by the possibility of misleading the jury and confusing the issues. * * * [T]he danger was too great that the jury would improperly consider such evidence for its validity or sound-ness as law, and not for its reflection on [Sanders'] state of mind. * * * [T]he jury gained a complete and accurate understanding of [Sanders'] state of mind from [Sanders'] own testimony and from the trade confirmations * * * . Even if it was

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[55] 955 F.2d 1206, 1214 (9th Cir. 1991).

> error * * * to exclude the [legal] materials * * * , it was harmless beyond a doubt.

Ct. Crim. App. Slip Op. at 16-17.

3. The Court of Criminal Appeals also rejected Sanders' contention that the trial court erred by denying proposed "specific jury [36] instructions regarding willfulness and good faith". "Although it may have been preferable to charge the jury on 'willfulness'," the court opined, "the instructions given * * * informed the jury" of the "*mens rea* necessary to convict [Sanders]." Ct. Crim. App. Slip Op. at 17-18.

E. Finally, the Court of Criminal Appeals affirmed the trial court's order requiring Sanders to pay the State $73,000 in restitution. Here, the court misstated Sanders' position. Sanders, the court said,

> asserts that the * * * restitution order * * * assumes that all of the transactions in this case were taxable. [Sanders] argues that it is uncertain as to whether or not all of the transactions were taxable, and thusly, the guilty verdict only required the jury to find five thousand dollars ($5000) in tax liability. Hence, [Sanders] contends that the trial court could only impose restitution in the amount of five thousand and one dollars ($5001).

Ct. Crim. App. Slip Op. at 22. In fact, Sanders argued that the restitution was excessive because there was no rational basis to conclude that *the jury* had found *all* of the exchanges taxable, whatever the trial court or the Court of Criminal Appeals concluded.[56]

Conducting its own *de novo* review,[57] the Court of Criminal Appeals acknowledged that there was no "documentation regarding the nature and amount of the victim's pecuniary loss * * * in the presentence report", and "no proof offered * * * at the sentencing hearing". The court, [37] concluded, however, that

> the State presented evidence concerning several transactions between [Sanders] and five (5) customers. [Sanders] disputed the taxability of these transactions, but he did not dispute the amount of money involved in each of the exchanges. * * * [W]e concluded that all of the transactions at issue * * * are properly subject to

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[56] *See* Appellant's Brief, State v. Sanders, Cause No. 02C01-9305-CR-00102 (Tenn. Ct. Crim. App.), at 92-93 (footnote omitted) (**bold-face emphasis** supplied):

> * * * the State's calculation of the tax owed from *all* the exchanges assumed, without proof, that **the jury** convicted Sanders on that basis. Had the indictment contained separate counts for each exchange, and had **the jury** convicted on all counts, this assumption would have been logical. *A fortiori* had **the jury** been specifically instructed to determine the State's damages. But here **the jury** entered a general verdict without mention of damages. Certainly **the jury** could have considered only *some* exchanges taxable, and convicted because the tax owed on *those exchanges alone* summed to more than $5,000.00.

[57] *See* T.C.A. § 40-35-401(d) (1990).

> sales tax. Given this finding, we can only conclude that the evidence * * * fully supports * * * imposition of seventy-three thousand dollars ($73,000) in restitution.

Ct. Crim. App. Slip Op. at 22-23.

V. The appeal to the Tennessee Supreme Court.

The Tennessee Supreme Court affirmed.

A. 1. The court first noted that "[o]ther jurisdictions with sales tax statutes similar to those in Tennessee have held that gold and silver bullion and coins are * * *-subject to sales tax". Sup. Ct. Slip Op. at 6, attached to this AMENDED PETITION. The court cited *no Tennessee* judicial or administrative decision to that effect, however.

2. The court then stated that [t]he evidence * * * establishes the State's position that the transactions on which [Sanders] failed to collect and remit sales tax were based on the intrinsic value of the precious metals rather than their representative value as a medium of exchange". Sup. Ct. Slip Op. at 7. The court did not acknowledge that the State *never* took this "position" at trial, however, but instead relied exclusively on the "investment" theory, and that the "intrinsic-value" theory arose for the first time only in the Court of Criminal Appeals' decision.[58]

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[58] The court set out an as example of its "intrinsic-value" theory the following: "the record shows that one customer paid $8,020.00 for 20 Krugerrands valued at $401.00 per ounce rather than valued according to an exchange rate between dollars and Krugerrands". Sup Ct. Slip Op. at 7. The court did not explain why, given that a Krugerrand contains exactly one ounce of

[38] **B.** The court then quoted *Scotchman's Coin Shop v. Administrative Hearing Comm'n*, 654 S.W.2d 873, 876 (Mo. 1983), for the notion that "[c]ommon sense dictates that [imposition of sales tax on exchanges of money] has nothing to do with the coining of money or the regulation of its value". Sup. Ct. Slip Op. at 7-8. The court cited *no* federal cases in support of this holding, however.

C. On the *Mallas* issue, the court simply quoted at length from the decision of the Court of Criminal Appeals. Sup. Ct. Slip Op. at 8-10.

D. Finally, the simply affirmed without analysis all of the other issues presented to the Court of Criminal Appeals. Sup. Ct. Slip Op. at 10.

* * *

[REMAINDER OF AMENDMENT TO
PETITION OMITTED]

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gold, the "exchange rate between dollars and Krugerrands" is not 401, *i.e.*, 401 FRNs exchange for 1 Krugerrand. In fact, the face-value of a Krugerrand is "1 ounce of gold". *See* R. at 371-422, *received into the record in* Vol. 21, at 3-6 & Exs. 1-3.

EXHIBIT A

[The original was a two-sided "Trade Confirmation" which has been reset to conform with Court Rules.]

F. Sanders, ***TRADE CONFIRMATION***
***Moneychanger,* S.P.**
National Security & Trust
Bldg.
868 Mt. Moriah,
Suite 205
Memphis, TN. 38117
(901) 767-4653

TRADE DATE DATE SHIPPED

YOU HAVE ☐ BOUGHT ☐ SOLD ☐ TRADED

Quantity	Description	Net Each	Total

Subtotal

Shipping

Total Due

Received

Date

Balance

***Please mail to P.O. Box 241203, Memphis, TN. 38124/1203**

Thank you!

Please Note

- Payment by cashier's check, money order, certified check, bankwire or cash must be made within 48 hours of your transaction date.

- Payment by personal check for established customers may be acceptable with prior consent, but shipment will be withheld twenty banking days for clearing. Shipments against cashier's checks drawn on banks outside Memphis, TN. will also be withheld for clearance.

- Please inspect this shipment carefully and report any discrepancies to us immediately.

- Please see the reverse for specifications and descriptions of the items on this contract.

- This contract is not valid unless signed and embossed with our seal.

Terms & Conditions

1. The confidentiality of this transaction is guaranteed by Franklin Sanders. Moneychanger, S.P. None of the details of this transaction shall be revealed to any person or agency without the specific prior written consent of the customer.

2. This writing is confirmation of our oral contract with you. In the event legal action should become necessary to enforce this contract, customer agrees to pay all reasonable legal fees and court costs. In any dispute the laws of the state of Tennessee shall govern.

3. We guarantee the authenticity of all items listed hereon. Should anything obtained from us prove to be otherwise than as described, our liability is limited to replacement of like item(s) or refund at full wholesale market "sell" price at the time of discovery. Notification in writing must be made to us within ten (10) days of discovery.

4. United States law at 12 USC 411 defines Federal Reserves notes as "obligations". At common law, debts can only be *paid* by money, which constitutionally (US Const. Art. I, Sec. 10) and at common law can only mean gold and silver. Regardless of whatever informal or customary language is used in trade, our business legally is buying notes and paying for them in gold and silver. Our acceptance of Federal Reserve notes (the green paper you carry in your billfold) in exchange for gold and silver money is a function of our common law "moneychanging" only, and is not an admission on our part, expressly or impliedly, that we recognize them as lawful or constitutional money. We will exchange any form of money substitute such as Federal Reserve notes or various foreign paper currencies, or other debt evidences or obligations for gold and silver money in its various forms. We do not recognize them as "money" in any lawful or constitutional sense.

5. The *Gold Standard Act of March 14, 1900,* Stat. at Large, XXXI, 45, defines a dollar of gold as a weight of fine gold (24 karat) of 23.22 grains (0.048375 troy ounce, or 1.5046 grams). It is our considered opinion that subsequent enactments which purport to have changed that standard were unlawful, and we accordingly cleave thereto. To convert dollars of gold to troy ounces of gold, divide dollars of gold by $20.67.

6. The *US Coinage Act of April 2, 1792,* Statutes At Large, I, 246, forever set and immutably fixed the standard dollar of silver as a weight of fine silver equal to 371.25 grains (0.7734 troy ounce, 24.0565 grams). To convert dollars of silver to troy ounces of silver, divide dollars of silver by $1.29292929.

7. The *Act to Devalue the Subsidiary Silver Coinage of February 21, 1853,* Statutes at Large, X, 160 (as amended by Act of February 12, 1873, XVII, STAT. 424), reduced the weights of the dime, quarter dollar and half dollar to 173.61 grains (0.3617 troy ounce), 86.805 grains (0.1808 troy ounce), and 34.722 grains (0.07234 troy ounce), respectively, and made them legal tender for $10.00 only. Allowing for abrasion of $10.82 (8.375 t. oz.) per $1,000.00, convert dollars of 90% silver dimes, quarters, or halves to standard silver dollars by dividing by 1.08168. To convert dimes, quarters, or halves to troy ounces, multiply dollars by 0.715.

		Gross Weight		Fine Gold Content		
	Dollars	**Troy Oz.**	**Grams**	**Troy Oz.**	**Grams**	**Fineness**
AUSTRIA						
100 coronas	$ 20.2625	1.0891	33.8751	0.9802	30.4876	90% (21.6 karat)
20 coronas	4.0475	0.2176	6.7681	0.1958	6.0900	90% "
10 coronas	2.2491	0.1088	3.2840	0.0979	3.0450	90% "
1 ducat	2.2925	0.1124	3.4960	0.1109	3.4493	$98\frac{2}{3}$% ($23\frac{2}{3}$ karat)
4 ducat	9.1742	0.4498	13.9903	0.4439	13.8037	$98\frac{2}{3}$% "
CANADA						
Maple Leaf	20.6718	1.0000	31.1034	1.0000	31.1034	99.9% (24 karat)
$\frac{1}{4}$ Maple Leaf	5.1680	0.2500	7.7759	0.2500	7.7759	99.9% "
$\frac{1}{10}$ Maple Leaf	2.0672	0.1000	3.1103	0.1000	3.1103	99.9% "
GREAT BRITAIN						
1 POUND (SOVEREIGN)	4.8661	0.2568	7.9874	0.2354	7.3217	91-$\frac{2}{3}$ & (22 karat)
MEXICO						
50 pesos	24.9240	1.3397	41.6692	1.2057	37.5000	90% (21.6 karat)
20 pesos	9.9700	0.5359	16.6680	0.4823	15.0000	90% "
10 pesos	4.9840	0.2679	8.3323	0.2411	7.5000	90% "
5 pesos	2.4930	0.1340	4.1679	0.1206	3.7500	90% "
$2\frac{1}{2}$ peso	1.2465	0.0670	2.0839	0.0603	1.8750	90% "
2 pesos	0.9964	0.0536	1.6658	0.0482	1.5000	90% "
1 ounce	20.6718	1.1111	34.5590	1.0000	31.1034	90% "
$\frac{1}{2}$ ounce	10.3359	0.5555	17.2795	0.5000	15.5517	90% "
$\frac{1}{4}$ ounce	5.1680	0.2777	8.6397	0.2500	7.7759	90% "
SOUTH AFRICA						
Krugerrand	20.6718	1.0909	33.9307	1.0000	31.1034	$91\frac{2}{3}$% (22 karat)
$\frac{1}{2}$ Krugerrand	10.3359	0.5455	16.9653	0.5000	15.5517	$91\frac{2}{3}$% "
$\frac{1}{4}$ Krugerrand	5.1680	0.2727	8.4827	0.2500	7.7759	$91\frac{2}{3}$% "
$\frac{1}{10}$ Krugerrand	2.0672	0.1091	3.3931	0.1000	3.1103	$91\frac{2}{3}$% "
2 Rand	4.8661	0.2568	7.9874	0.2354	7.3217	$91\frac{2}{3}$% "

UNITED STATES						
$20	20.0000	1.0750	33.4302	0.9675	30.0925	90% (21.6 karat)
$10	10.0000	0.5375	16.7181	0.4837	15.0462	90% "
$5	5.0000	0.2688	8.3591	0.2419	7.7313	90% "
$2½	2.5000	0.1344	4.1795	0.1209	3.8656	90% "
$1	1.0000	0.0538	1.6718	0.0484	1.5046	90% "
SILVER						
*$1.00	$ 1.0000	0.8500	26.4379	0.7659	23.7941	90%
** 0.50	0.5000	0.3972	12.3550	0.3575	11.1195	90%
** 0.25	0.2500	0.1986	6.1775	0.1788	5.5597	90%
** 0.10	0.1000	0.0794	2.4710	0.0715	2.2239	90%
*** 0.50	0.1928	0.3688	11.4694	0.1475	4.5878	40%
BULLION						
100 ounces	129.2929	100.0000	3,110.34	100.0000	3,110.34	99%
10 ounces	12.9293	10.0000	311.034	10.0000	311.034	99%
1 ounce	1.2929	1.0000	31.1034	1.0000	31.1034	99%

*The statutory content of a standard dollar of silver is 371.24 grains of 99.9% fine silver (0.7734 troy ounce, 24.0577 grams). The value given above is for circulated dollars of silver at 0.765 troy ounce each.

**The statutory content of dimes, quarters and halves is 0.7234 troy ounce of 99.9% fine silver per dollar. The value given above is for circulated coin at 715 troy ounces per $1,000.00 face value bag. They are 90% silver by weight.

***Half dollars minted between 1965 through 1970 contain 0.295 troy ounces of 99.9% fine silver per dollar face value. They are 40% silver by weight.

1 troy ounce = 1.097 avoirdupois ounce = 480 grains = 31.1034 grams

Gold $1.00 = 23.22 grains = 0.048375 troy ounce = 1.5046 grams

Silver $1.00 = 371.25 grains = 0.7734 troy ounce = 24.056 grams